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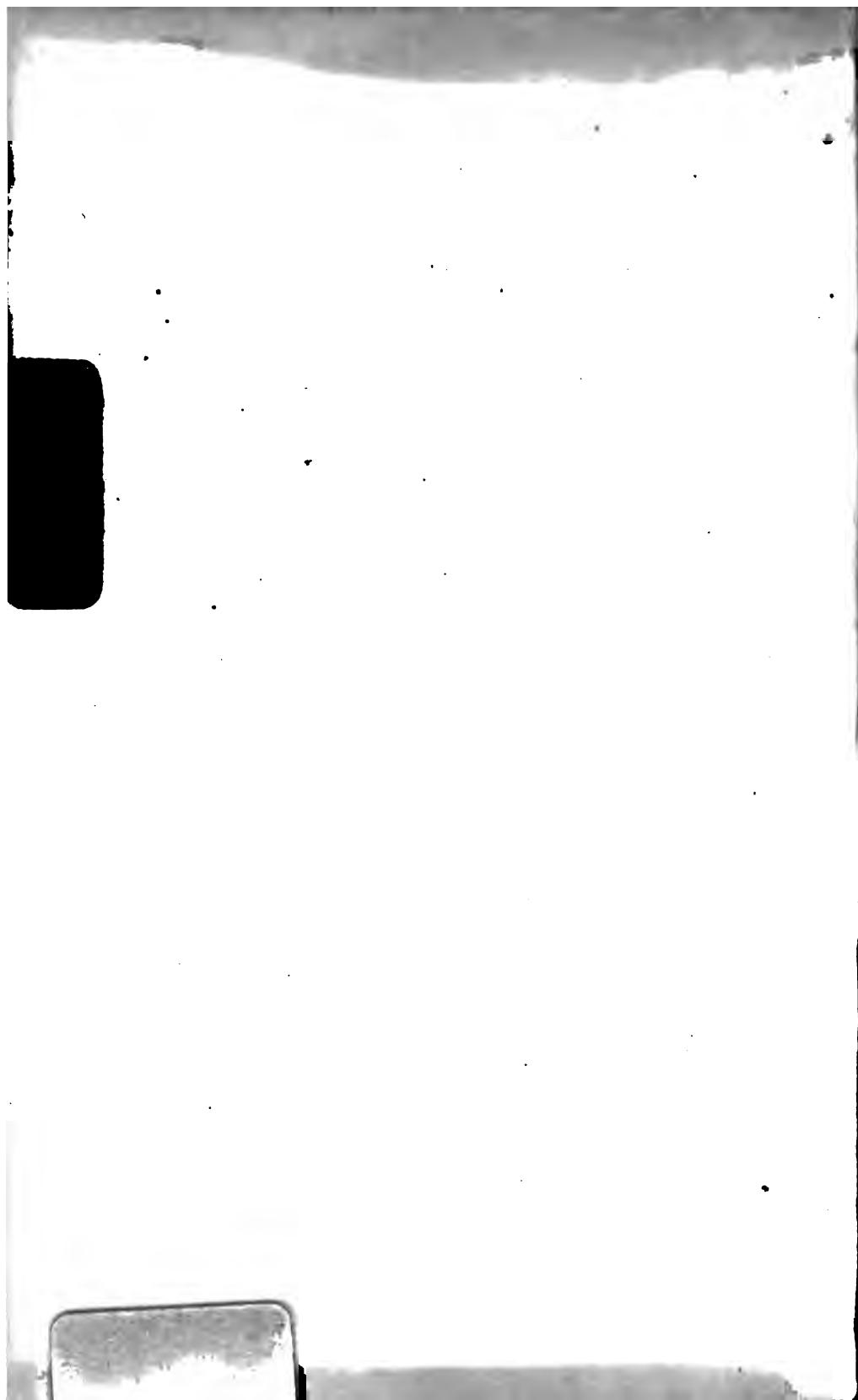
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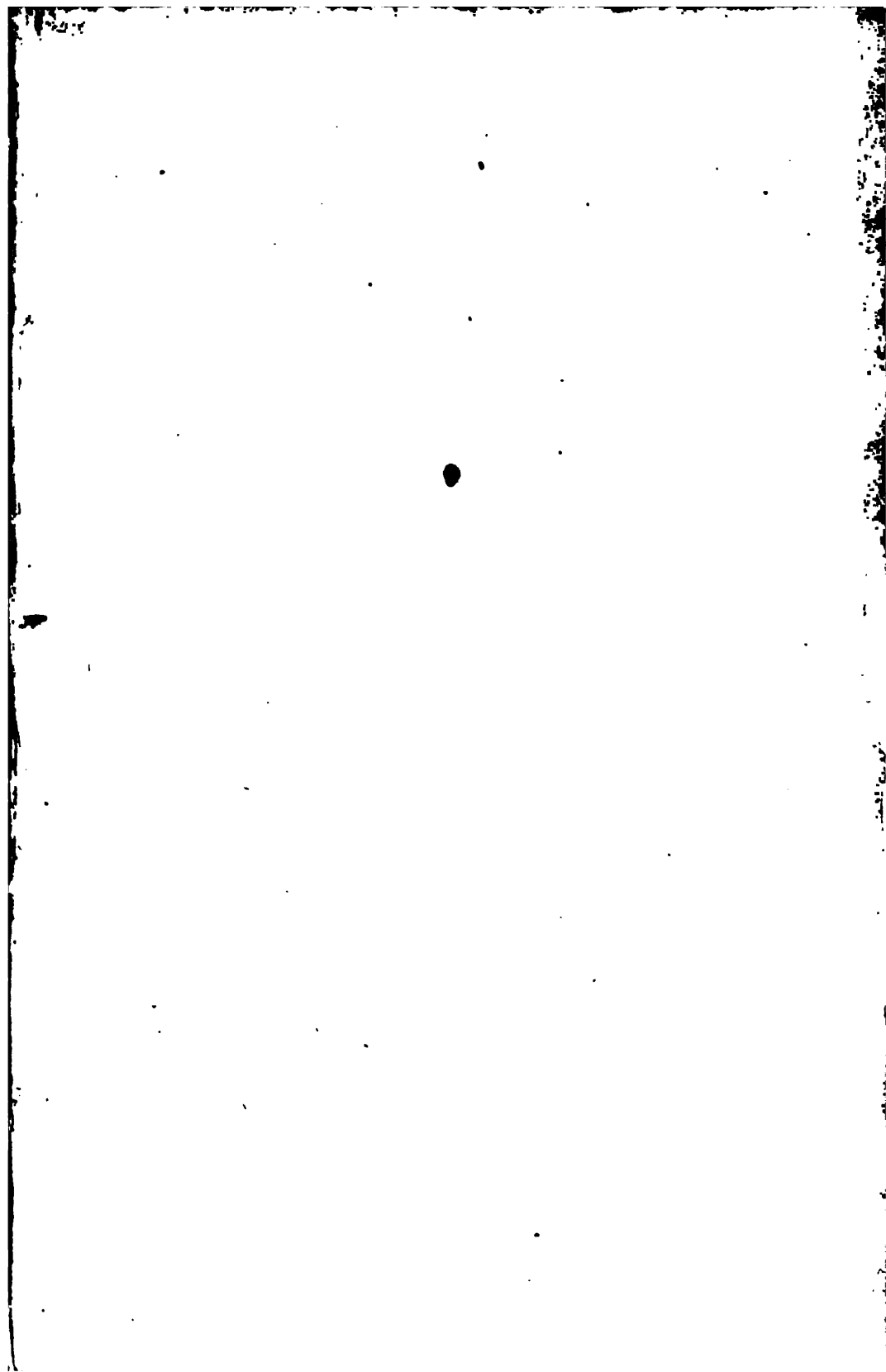
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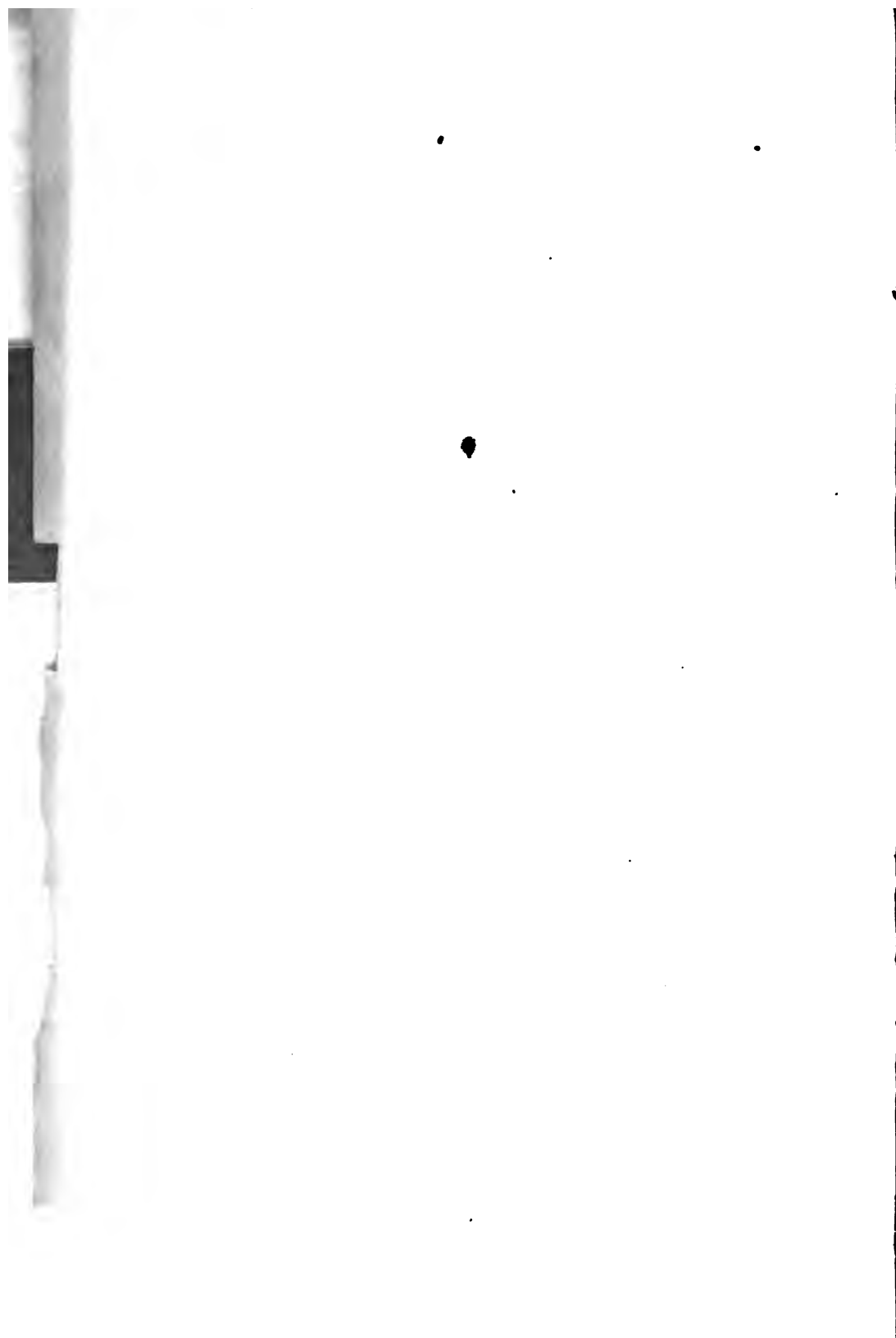
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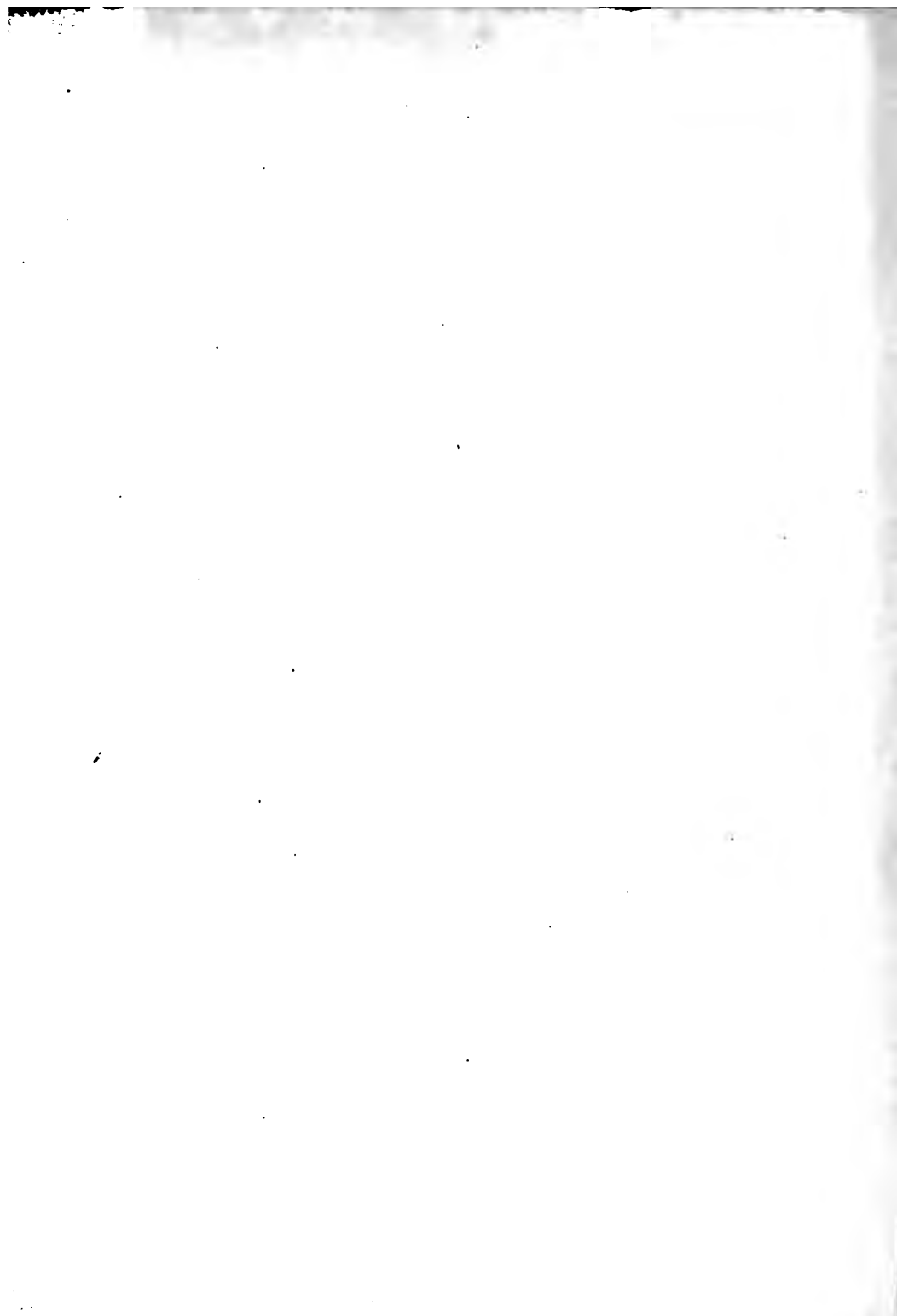
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REPORTS
OF
C A S E S
ARGUED AND DETERMINED
IN THE
Supreme Court of Judicature,
AND IN THE
COURT FOR THE TRIAL OF IMPEACHMENTS
AND
THE CORRECTION OF ERRORS,
IN THE
STATE OF NEW-YORK.

BY WILLIAM JOHNSON,
COUNSELLOR AT LAW.

VOL. I.

Third Edition, with additional Notes and References

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1864.

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JUDGES

OF

THE SUPREME COURT OF JUDICATURE

OF

THE STATE OF NEW-YORK,

DURING THE YEAR 1806.

JAMES KENT, Esq., *Chief Justice.*

BROCKHOLST LIVINGSTON, Esq.

SMITH THOMPSON, Esq.

AMBROSE SPENCER, Esq.

DANIEL D. TOMPKINS, Esq

Attorney General.

JOHN WOODWORTH, Esq.

DISTRICT OF NEW-YORK, ss.

BE IT REMEMBERED, That on the seventeenth day of January, in the thirty-first year of the Independence of the United States of America, WILLIAM JOHNSON, of the said district, hath deposited in this office the title of a book, the right whereof he claims as author, in the words and figures following, to wit:

" Reports of Cases argued and determined in the Supreme Court of Judicature, and in the Court for the Trial of Impeachments and the Correction of Errors, in the State of New-York. By William Johnson, Counsellor at Law. Vol. I. Second edition, corrected, with additional references."

In conformity to the act of the Congress of the United States, entitled, " An Act for the encouragement of learning, by securing the copies of maps, charts, and books, to the authors and proprietors of such copies, during the times therein mentioned;" and also to an act, entitled, " An Act supplementary to an act, entitled, An Act for the encouragement of learning, by securing the copies of maps, charts, and books, to the authors and proprietors of such copies, during the times therein mentioned, and extending the benefits thereof to the arts of designing, engraving, and etching historical and other prints."

EDWARD DUNSCOMB,
Clerk of the District of New-York.

P R E F A C E .

A KNOWLEDGE of the unwritten or *common law* is principally obtained from the decisions of courts of justice, established to expound and declare the law of the land. It is only by accurate histories of these decisions, in which are preserved the principles and reasons of every adjudication, that we can obtain any satisfactory or authoritative evidence of the rules and maxims by which our conduct is to be directed, in the various relations of social life, and in the infinitely diversified transactions of civil society. The necessity of such histories of judicial determinations was very early felt, and their utility has been proved by long experience, in that country from which we derive so large a portion of our jurisprudence. It is now more than five hundred years since *Reports* were first published in *England*, and the numerous volumes in which they are contained constitute the most instructive part of the lawyer's library. If works of this nature have been found so indispensable in that country, they are far more necessary in our own, where new questions every day arise, in the decision of which, *English* adjudications cannot always afford a certain guide.

By the thirty-fifth section of the constitution of this state, it is declared, " that such parts of the common law of *England*, and of the statute law of *England* and *Great Britain*, and of the acts of the legislature of the colony of *New-York*, as together formed the law of the colony on the 19th *April*, 1775, should be and continue the law of this state, subject to such alterations and provisions as the legislature should, from time to time, make, concerning the same " and that all such parts of the *English* common law or statutes, as related to a church establishment, or the sovereignty of *Great Britain* over the colony, or which were repugnant to the constitution, should be abrogated. The decisions of *English* courts, therefore, since the period fixed by the constitution, though entitled to the highest respect, are no longer considered as authoritative precedents. Many parts, too, of the *English* law, which were found inapplicable to our situation, as a sovereign and independent state, or incompatible with the principles of the form of government which we adopted, have been altered or repealed, by different acts of the legislature. Though the *English Reports*, published since the revolution,

will continue to be read by every lawyer, who entertains a just and liberal view of his profession, as containing the opinions of judges of eminent learning and ability, expounding the principles of that excellent system of jurisprudence which has been adopted as the basis of our own, yet it may be observed, that of the numerous questions decided in *Westminster Hall*, a small number only are found applicable to cases which arise here. We must look, therefore, to our own courts, for those precedents which have the binding force of authority and law. But how are their decisions to be known? Must they float in the memories of those by whom they are pronounced, and the law, instead of being a fixed and uniform rule of action, be thus subject to perpetual fluctuation and change? No man doubts of the propriety or necessity of publishing the acts of the legislature. As the rights and interests of every individual may be equally affected by the decisions of our courts, one would naturally imagine, that it would be equally a matter of public concern, that they should be made known in some authentic manner to the community.

Though the want of reports of the judicial proceedings of our courts had long been felt by the profession, it was not until 1803(a) that any attempt was made to give them to the world. Considerations of public benefit, and a desire to assist the laudable efforts of an individual, induced the legislature, in 1804, to pass a law, authorizing the Supreme Court to appoint a *Reporter*, to whom was allowed a moderate salary; thus sanctioning an undertaking, the continuance and success of which must depend on legislative support, and the patronage and favor of a learned and liberal profession, for whose use these reports are particularly intended.(b)

To record truth is the duty of every historian; and there is no species of history which requires a more rigid performance of this duty, or a more scrupulous accuracy, than that which professes to give an account of the proceedings of courts of justice. Destitute of this essential quality, Reports would serve only to mislead and perplex, while they pretended to inform and instruct. How far those now offered to the public have a just claim to the character of correctness, remains to be determined by those from whose decision there is no appeal. It may be proper, however, before a definitive opinion is formed, to mention some of the advantages that have been possessed, and the means which have been used, to arrive at that degree of accuracy, which can alone entitle them to be regarded as authentic evidences of the law.

(a) The Reports of Mr. *Caines* commence with *May* term, 1803, and end with *November* term, 1805.

(b) Since the first edition of this volume, the cases decided in this court and in the Court of Errors from *January* term, 1799, to *January* term, 1803, have been collected, and published by the present reporter, so as to complete a regular series of reports from 1799 to the present time.

By a rule of practice established in 1799, every motion is brought before the court, pursuant to a notice given to the opposite party. If the motion relates to matters of practice, it is supported by *affidavits*; if it is to set aside a nonsuit or verdict, on points of law, *cases* are previously prepared and settled by counsel, containing all the facts relied upon by either party, copies of which, with the points to be insisted on by the counsel, are delivered to the judges. From those papers, by the liberality of the counsel, and of the clerks of the court, I have been enabled, at my leisure, to select and arrange every material fact in each cause. An object of more importance was to state the opinions delivered by the court exactly as they were pronounced. By the kindness of the judges, who, in the most flattering and obliging manner, have communicated to me their written opinions and notes, without reserve, I have been relieved from all solicitude as to the due performance of this part of my labors. Thus, in what may be deemed to be most essential in the report of a cause, the facts, and the judgment of the court, I have not only been saved from the chance of misapprehension and error, but have been enabled to attain all the accuracy that could be desired or expected. In stating the arguments of the counsel, in those causes in which they were deemed important, I have to claim the candor and indulgence of the gentlemen by whom they were delivered, for any errors which may be discovered. Unused to the practice of short-hand writing, I have been obliged to rely on a quick pen and on memory. But I trust that no material argument advanced, or authority cited, has been omitted. As the cases of each term are prepared and published in the ensuing vacation, many errors and inelegancies of expression may escape my attention at the moment, which, if more time were allowed to revise and polish, would not have been suffered to pass. But defects of this nature are more than compensated by the advantages of a speedy publication. I shall feel obliged, however, to those gentlemen who will take the trouble to point out such errors as may appear, or suggest any hints by which the future volumes of this work may be improved. Without bestowing much thought on the best possible plan for a work of this kind, I have adopted the manner of the most approved *English* Reporters, because it was familiar to every lawyer, and possessed the authority of experience in its favor.(a)

(a) As to the utility and necessity of reports, and the best mode of reporting, the opinion of Lord Bacon must have the greatest weight. "*Ante omnia, judicia reddita in curiis supremis et principalibus, atque causis gravioribus, præsertim dubiis, quæque aliquid habent difficultatis aut novitatis, diligenter et cum fide excipiunt. Judicia enim anchoræ legum sunt, ut leges reipublice.*"

"*Modus hujusmodi judicia excipiendi, et in scripta referendi, talis esto. Casus præcise, judicia ipsa exactè perscribito: rationes judiciorum, quas adduxerunt judices, adjicito: casuum, ad exemplum adductorum, auctoritatem cum casibus principalibus ne commisceto: de advocatorum perorationibus, nisi quidpiam in iis fuerit admodum eximium, sileto.*"

"*Personæ quæ hujusmodi judicia excipiant, ex advocatis maxime doctis sunt, et honorarium liberæ ex publico excipiunt. Judices ipsi ab hujusmodi præscriptionibus abstinent: ne forte opinionibus propriis addicti, et auctoritate propria freti, limites referendarii transcendant.*"

"*Judicia illa. in ordine et serie temporis, digerito: non per methodum et titulos. Sunt enim scripta etus*

In an undertaking which admits of no higher claim to praise, than what is founded on diligence and accuracy, the Reporter must remain content with the hope, that his labors may be found useful, and that he has discharged some part of that duty which every man, according to Lord Coke, owes to his profession.(a)

modi, tanquam historias, aut narrationes legum. Neque solum acta, sed et tempora ipsorum, judicii prudenti lucem præbent." (*De aug. Scient.* lib. 8. c. iii. *Aphoris.* 73, 74, 75, 76. *Bac. Works*, vol. 7. p. 456, 457.)

(a) See 6 *Co. Rep. Pref.* "If these, or any other of my works, may, in any sort, (by the goodness of Almighty God, who hath enabled me thereunto,) tend to some discharge of that great obligation of duty wherein I am bound to my profession, I shall reap some fruits of the tree of life." The same sentiment is expressed by Lord Bacon. "I hold," says he, "every man a debtor to his profession; from the which, as men of course do seek to receive countenance and profit, so ought they of duty to endeavor themselves, by way of amends, to be a help and ornament thereunto. This is performed, in some degree, by the honest and liberal practice of a profession, when men shall carry a respect not to descend into any course that is corrupt and unworthy thereof, and preserve themselves free from the abuses wherewith the same profession is noted to be infected; but much more is this performed, if a man be able to visit and strengthen the roots and foundation of the science itself; thereby not only gracing it in reputation and dignity, but also amplifying it in profession and substance." (*Bac. Works*, vol. 4. p. 10. *Pref. to Law Tracts*)

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CASES

ARGUED AND DETERMINED

IN THE

Supreme Court of Judicature

OF THE

STATE OF NEW-YORK,

IN FEBRUARY TERM, IN THE THIRTIETH YEAR OF OUR
INDEPENDENCE.

D. and G. LUDLOW *against* BOWNE and EDDY.

THIS was an action on a policy of insurance on the cargo of the ship *Sisters*, upon a voyage, at and from New-York to Havre de Grace, in France. The cause was tried before Mr. Justice Livingston, at the New-York circuit, the 26th June, 1803, when a verdict was found for the plaintiffs, as for a total loss, for the sum of 1,153 dollars, subject to the opinion of the court, on the following case :

On the 28th of June, 1793, (a) the defendants underwrote the policy to the plaintiffs, for 300 pounds, at 3 1-2 per cent. premium; and the vessel and cargo were both warranted *American property*. The *Sisters*, with the cargo insured, sailed from New-York, on the 19th day of July, 1793, and was captured during her voyage by a *British cruiser, and afterwards condemned in the British Admiralty Court, as *French property*. The goods insured consisted of 752 barrels of pot and pearl-ashes; 302 barrels of which which were consigned to M. M. François Poulhain and Co. and the residue to Messrs. Morgan and Son, merchants, residing at Havre de Grace. They were purchased by the plaintiffs in New-York, and shipped under an agreement made between them and the consignees, the terms of which are contained in the following letter from one of the plaintiffs :

"London, May 11, 1792.

"M. François Poulhain,

"By the post to-day, I received yours of the 4th instant,

(a) The trial of this cause had been delayed for want of proofs, or some other reason, on the part of the plaintiffs.

Insurance on goods from New-York to France, warranted American property. The goods were purchased and shipped in an American vessel by American merchants, to merchants in France, under an agreement, between them for that purpose, by which

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the former were to deliver the goods at St. Vallery, for which they were to be allowed 8 per cent. commission, taking on themselves all risks, expressly including a premium for sea-risk, as well as war-risks; the consignees to pay the freight on delivery, and also for the amount of cargo in bills on Lon-

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don, guar-
anted by a com-
mercial house in
London. Dur-
ing the voyage,
the goods were
captured by the
British, and
condemned, as
French property.
—Held that the
goods remained
the property of the
consignors until
their delivery in
France; and
that the war-
ranty in the
policy was com-
plied with. Such
a contract is
legal and valid,
and does not
change the
property, so as
to destroy its

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neutral charac-
ter, or vitiate
the contract of
insurance. (a)

(a) *N. Y. Fire-
men Ins. Compa-
ny v. De Wolf*, 2
Cow. Rep. 56.
*De Wolf v. The
New York Fire-
men Ins. Co.* 20
Johns. Rep. 214.

directing me to purchase 300 barrels ashes, and some oil, on certain conditions, mentioned to Messrs. *Michault*. That we may perfectly understand each other, they were, viz. a commission of 2 1-2 per cent. on the amount of invoice, and an additional commission of 3 per cent. on do. for the war-risk. It is not understood that I am to assume the usual sea-risk, but, for my security, I ought to make the insurance, in order to prove the property mine, in case of capture; this will be 2 1-2 per cent. I must pay to have it done; so that taking on myself all risks, and delivering you the goods at *St. Vallery*, save that of the freight, which you must pay, you must allow me 8 per cent. on the amount of invoice; my bills are to be paid 60 days after the vessel's arrival at *St. Vallery*, in *London*; the exchange fixed at par, say 100l. sterling for 177l. 15s. 7d. *New-York* currency, with the guaranty of Messrs. *Thelusson*, for the payment. These are the terms mentioned to Messrs. *Michault*, and on which I am willing to execute your orders. You will please to send to Mons. *Blandel* a copy for his direction. When I receive your answer, I will write to my house, and you may depend on my attention, and the ashes shipped in season.

"D. LUDLOW."

At the time of the shipment of the ashes, the plaintiffs possessed funds belonging to *Morgan and Son*, which were afterwards remitted to them; but they held no funds of *M. M. F. Poulhain and Co.* The amount of the *goods was charged to those persons respectively, in the books of the plaintiffs.

It was admitted that the war commenced between *Great Britain and France* on the 1st *February*, 1793.

Two questions were raised for the consideration of the court. 1. Who was the legal owner of the goods at the time of their shipment and capture? 2. Was the contract, made between the plaintiffs and the merchants in *France*, valid, according to the law of nations? or, in other words, was the property *American*, within the true meaning of the warranty contained in the policy?

This cause was argued, at a former term, by *Harison and Hoffman*, for the plaintiffs, and *Pendleton and Radcliff*, for the defendants. By direction of the court, it was again argued, at the last term, by the same counsel, with great learning and ability. (b)

The judges, not being unanimous, now delivered their opinions *seriatim*.

TOMPKINS, J. Two questions are presented by this case. 1. Whether the property in the goods insured, and shipped

(b) In this and several other causes, argued at the last term, the reporter must crave the indulgence of the counsel for the omission of their arguments. Not expecting, at the time, to report the cases, no notes were taken, and it would be doing injustice to the gentlemen concerned, to give an imperfect account of what was said by them.

under the contract stated, belonged, during the transportation, to the plaintiffs, or to the consignees at *St. Vallery*.

2. Whether the contract be valid, according to the established principles of the law of nations.

1. The goods in question were purchased by the plaintiffs with their own funds, and upon their own credit, and it is not controverted, but that they vested in the plaintiffs, on the delivery to them by the persons of whom they were purchased. There was no privity between the *French* merchants and the original vendors; nor could the former be responsible to the latter for the price agreed to be paid for them. That this property was not divested by the subsequent delivery of the goods to the captain *will be evident, if we attend to the terms of the contract under which they were shipped. The goods, after their arrival at the port of destination, were not at all events, to go into the possession of the consignees. The *French* merchants were not entitled to receive the goods, until they had performed the precedent conditions, as to the payment stipulated in the agreement. If they had never arrived at *St. Vallery*, the Messrs. *Ludlow* could not have resorted to the *French* merchants, according to the terms of this contract, for the stipulated price; on the other hand, had the latter failed to perform the conditions on which the goods were to be delivered, they never could have compelled the plaintiffs to deliver them. Had a loss happened by the perils of the sea, and the insurers become insolvent; had the goods been destroyed by accident in the warehouse before they were laden; had the consignees refused to pay freight; had the failure of Messrs. *Thelusson and Co.* put it out of the power of the consignees to obtain the stipulated security; or had the vessel, by stress of weather, been driven into a different port, and there terminated her voyage, the cargo would have continued in the plaintiffs, and the loss or profit, in either event, would have remained to them. Indeed it seemed to be conceded by one of the defendants' counsel, on the argument, that the legal ownership of the goods was in the plaintiffs; and the ground of defence was confined to the objection, that this contract was a mere cover, and fraudulent and void, as it respected belligerents.

Fraud ought not to be presumed; and, unless the agreement itself purports fraud, or is one forbidden by the acknowledged principles of the law of nations, the plaintiffs in this case ought to recover.

2. It cannot be denied that a neutral may, without contravening any established principle of the law of nations, carry on commerce with either of the belligerent parties, in the same manner and to the same extent, as in time of peace, except in articles contraband of war, or to a blockaded port. The decisions in the Court of Admiralty in *England*, so much relied on by the defendants, have not proceeded on the notion

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that a neutral cannot, *flagrante bello*, contract to sell *and consign his own goods to a belligerent, for a stipulated profit, to be paid on delivery. The determinations which have been made on contracts, somewhat similar to the present, are supported by a rule of evidence peculiar to those courts; a *presumptio juris et de jure*, by which such contracts are determined to be fraudulent and collusive, and made for the purpose of covering the property of an enemy. They have considered the capture as equivalent to a delivery to the belligerent to whom it is consigned, and to whom it is thus presumed to be long. Without arraigning those decisions, it is sufficient, in the present case, to say, that such an arbitrary rule of evidence is not to be resorted to here, and that the contract in question does not afford that presumption; on the contrary, its provisions are of a nature to exclude every reasonable inference of fraud, and to evince the neutrality of the property. The checks interposed, which might prevent its ultimate delivery to the consignees at *St. Vallery*; the security to be given, and the conditions to be performed, in order to entitle the latter to receive the goods, and the assumption of all risks by the consignors, until the delivery of the property, are satisfactory evidence, to my mind, that the contract was *bona fide*; and that, in the contemplation of the parties, the ownership and control of the property was to continue in the plaintiffs, who retained the right wholly to refuse the delivery of the goods in case the consignees should fail to perform the conditions previously stipulated. For these reasons, I am of opinion, that the plaintiffs have complied with their warranty, and that they ought to recover the amount insured by the defendants.

SPENCER, J. By the contract entered into between the plaintiffs and the *French* merchants, the property in the ashes, insured and warranted to be *American*, remained in the plaintiffs, until its delivery to the *French* houses at *St. Vallery*. The delivery could not be insisted on, until bills for the amount on *London*, payable in sixty days after the arrival of the goods at *St. Vallery*, with the guaranty of the Messrs. *Thelusson*, had been furnished by the consignees to the plaintiffs.

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The goods having been captured and condemned, on *their way to *St. Vallery*, there can be no pretence to say, that the property, at the time of capture, did not exclusively belong to the plaintiffs. The defendants' counsel did not controvert the proposition, that by the rules of law, as between the plaintiffs and the *French* merchants, the property never had been transferred from the plaintiffs. But it was insisted, that there was an *equitable* interest, by virtue of the contract, vested in the consignees, which, from a state of war between *France* and *England*, justly exposed the property to capture, and that, by the law of nations, property so circumstanced was liable to

capture and condemnation, on the ground of its being fraudulently covered with an intent to evade capture, and to supply a belligerent. These two propositions remain to be examined.

1. It is difficult to perceive in what manner the *French* merchants had acquired a vested equitable interest in these goods. The contract was, in its nature, executory; and no part of the price had been paid; they had an expectation of receiving them, but, *on no legal principles*, were they clothed with the rights of a *cestuy que trust*. It has been fancifully said, that because the goods were consigned to them, the capture by the *English* is to be deemed a delivery to the consignees. In the view of a court of *admiralty*, this may be so; but, most certainly, if the *Frenchmen* were amenable to our own laws, the plaintiffs could never recover of them the price of the goods, under that notion. Nothing but an actual delivery, or offer to deliver, would render them responsible upon the contract.

2. The goods in question, not being contraband, within the utmost latitude to which that list has been swelled, were a lawful subject of commercial adventure by a neutral in time of war. The warranty that it was neutral has been verified. This warranty cannot be extended so far, as that the property shall be regarded neutral by belligerents, but only that it is truly so, according to the code of the law of nations.

The cases decided by Sir *William Scott*, do not bear an analogy to the present. In this, the property was not absolutely to vest in the *French* houses, on its arrival at *St. Vallery*; certain acts were to be done on their part, as conditions *precedent, as the drawing of the bills on *London*, with a guaranty, for the amount of the cargo. These acts were contingent, and might never be performed.

It appears to me that the *English* courts of admiralty, on questions bearing a resemblance to the present, are governed more by ideas of political expediency, and of the necessity of destroying any commerce with their enemy, than by the law of nations. The High Court of Admiralty in *England*, probably, regarded this shipment as a fraud on belligerents, in attempting to evade capture and condemnation; but I do not feel myself bound by their precedents, nor required to justify their solicitude to condemn, from motives of policy.

By the law of nations, a neutral has a right, with the exceptions of contraband goods, and going to a blockaded port, to supply the belligerents. This right, enforced by considerations of justice, as it regards neutrals, is not to be frittered away, by inquiring whether a belligerent has, by one mode of supply, or another, a prospect of greater mercantile advantage. The true inquiry is, Is the property of a muniment of war within the list of contraband, and does it belong to an enemy, or a friend? Thinking, as I do, that the warranty in this case has been fulfilled, and that, at the time of the capture, the

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goods belonged to the plaintiffs, I must say, that they are entitled to judgment.

THOMPSON, J. The questions presented by this case are, 1st. In whom must the right of property in the shipment be deemed vested at the time of capture? 2d. As to the legality of the contract made between the plaintiffs and the *French* merchants.

1. The subject insured consisted of pot and pearl-ashes, warranted *American property*. The shipment was made under an agreement, and upon the terms stated in the letter of *Daniel Ludlow*, of the 11th of *May*, 1792, contained in the case, and to which we must resort, in order to ascertain the rights of contracting parties; and in doing this, the contract must be construed, without reference either to a state of peace or war; that point will come under consideration in the examination of its legality.

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*According to my understanding of the agreement, without entering into a minute detail of its several parts, the fair and obvious import of it is, that the plaintiffs stipulate to take all risks, of every description whatever, upon themselves, and to deliver to certain *French* merchants, at *St. Vallery*, in *France*, a quantity of goods, upon certain conditions to be performed on their part. These conditions were, that they should pay the plaintiffs the amount of the invoice price, with the addition of 8 per cent. on such amount, the payment to be made in *London*, sixty days after the vessel's arrival at *St. Vallery*, and the guarantee of Messrs. *Thelusson* to be given for such payment, the *French* merchants also paying the freight. Though the case states generally, that the cargo was consigned to the *French* merchants; yet it is to be observed, that the contract contains no stipulation, that they were to be the consignees. This consignment must, therefore, be open to explanation, whether made to them on their own account and risk, or on account and risk of the consignors. Here then arises the question. Where a shipment is made, under such circumstances, in whom must the property be deemed vested, until its arrival? I think, clearly in the plaintiffs. I cannot consider the plaintiffs as acting in the character of mere agents. Part of the allowance to be made to them is, to be sure, classed under the denomination of commissions, which, in mercantile language, may generally be considered as a compensation for the services of agents or factors; yet this circumstance, of itself, is not sufficient to restrict them to that character, when, from the general scope and nature of the transaction, they are represented as principals. The plaintiffs, having funds in their hands belonging to one of the *French* houses, could not, in any manner, qualify their character. These funds were not to be applied to the purchase of, or as payment for, this cargo. By the contract, payment was to be made in *London*: besides, these funds

have since been remitted; at what particular time, however, does not appear. The plaintiffs, then, must be viewed in the capacity of vendors, making a contract with respect to this shipment, which was to be consummated in *France*; and the most that can be said *is, that they had secured a market on its arrival there. The argument most urged, on the part of the underwriters, is, that this cargo went consigned to the *French* merchants, which, it is said, vested in them the right of property. I do not think it necessary to controvert the general proposition, that when goods are shipped on account of, and consigned to a foreign merchant, the property shall, *prima facie*, be deemed vested in the consignee, subject to the right of stopping *in transitu*, in case of insolvency. In such cases, probably, the master of the ship ought to be considered as the agent of the consignee, and a delivery to the former as equivalent to a delivery to the latter; neither can it be denied that where the consignment is for account of the consignor, the property remains vested in him, and he is deemed the legal owner. (*Evans v. Martell*, 12 *Mod.* 156.) The consignment is always subject to be controlled and explained, according to the understanding and evident intention of the parties. (*Hibbert v. Carter*, 1 *Term Rep.* 748.) So that, admitting it to have been general to the *French* merchants, if it be manifest that it was not the intention of the parties to vest in the consignees the right of property, such must be considered as the legal operation of the consignment. That it was the intention of the parties that the property should remain vested in the plaintiffs, cannot, it appears to me, admit of a doubt; otherwise, the consignment is at war with the contract and the whole tenor of the transaction.

Whatever may be the general rules of law, and the ordinary course of commerce applicable to any given class of cases, there can be no doubt that these general rules may be varied and modified, by special agreement. (3 *P. Wms.* 186. *Godfrey v. Furzo*, 1 *Term Rep.* 748.) This was admitted in its fullest extent, by Sir *William Scott*, in the case of the packet *De Bilboa*. (2 *Rob. Rep.* 133.) The vesting of property, says Lord *Mansfield*, may differ, according to the circumstances of cases. (*Davis and another v. James*, 5 *Burr.* 2680.) The general rule of law is, that, as between vendor and vendee, the property is not altered until the delivery of the goods. (*Snee and others v. Prescott and others*, 1 *Atk.* 245. *Mason v. Lickbarrow*, 1 *Hen. Bl. Rep.* 35. *Ellis v. Hunt*, 3 *Term Rep.* 469.) A distinction is, sometimes, made between an actual delivery to the vendee himself, and a constructive delivery to some intermediate person. In the latter case, when the *goods are at the risk of the vendee, it is equivalent to an actual delivery. (3 *Term Rep.* 469.) Every legal contract may, however, be modified according to the will of the contracting parties; and, when special, it is to that we must look, in order to ascertain their rights. It

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cannot, I think, be denied that, in the present case, it was obviously the intention of the parties, that the entire dominion and control over this property should remain in the plaintiffs until its arrival in *France*. The insurance was to be made by them, and for their own benefit. The property was, by the terms of the contract, expressly at their risk. If lost, the loss would have fallen on them; or if the underwriters had become insolvent, the loss would have been theirs. And Sir *William Scott* observes that this is the true criterion of property: He is to be deemed the proprietor, on whom the loss would fall, in case of accident. (2 *Rob. Adm. Rep.* 135.) This is certainly a just and rational criterion, between the vendor and vendee; the former is presumed to get a compensation for the risk, and the loss is, therefore, to be borne by him.

The guaranty of Messrs. *Thelusson*, for the payment of the plaintiffs' bills in *London*, may be considered as a condition precedent; and if so, the Messrs. *Ludlow* would have had a right to demand such guaranty, before the *French* merchants could have claimed a delivery of the property. The plaintiffs appear to have studiously guarded the contract, so as to retain the control over the shipment, until they should be secured in the payment for it. For this purpose they assumed all risks of every description, until its arrival in *France*. There was the place designated for the consummation of the contract. The master of the vessel must have been their agent, and the bills of lading given on their account and risk, in order to retain the security; that being one of the principal ingredients in the contract. That the *French* merchants stipulated to pay the freight, cannot be material, according to the opinion of Sir *William Scott*, in the case of the packet *De Bilbao*; and, indeed, he admits in that case, that a contract like the present, in time of peace, would be legal, and the right of property remain vested in the vendor. The parties have a right to stipulate, that the whole risk should fall on the consignor, *until the goods come into possession of the consignee, or they may divide the risk as they please. Thus far I have considered this transaction as between vendor and vendee, without any reference to the rights of third persons; and, I think, I am warranted in concluding, that, as between them, the property must, at the time of the capture, be deemed to have vested in the plaintiffs. If so, their warranty has not been broken, unless the contract, under which the shipment was made, was illegal and void.

2. The second question then arises, as to the legality of the contract. The warranty that the property was *American*, means that it was so by the law of nations. This was so determined in the case of *Duguet v. Rhinelander*. (a)

If I am correct in the conclusions above drawn, that a contract like the present would, according to the law of nations,

(a) Since reported in 1 *Johns. Cas.* 360. but see 2 *Johns. Cas.* 476. S. C.

be legal in time of peace, and that, according to established principles of law, the property would be deemed vested in the plaintiffs, until an actual delivery in *France*, I cannot suppose that a state of war would change or vary the rules. I find no such principles recognized in the law of nations. The general rule is, that neutrals have a right to carry on commerce with the belligerent, the same in war as in peace, except in contraband goods, and to blockaded ports. Contracts, like the present, have unquestionably been considered, by Sir *William Scott*, in the *British* admiralty courts, as illegal; and were the rules there adopted to govern the case before us, we should be bound to pronounce that there had been a breach of the warranty. The warranty, however, is not to be tried by those rules, unless they are sanctioned by the law of nations.

That courts of admiralty are, sometimes, governed by special instructions, which are not in perfect conformity with the general law of nations, cannot be denied. The rights of neutrals, as well as those of belligerents, are to be regarded and protected. And it is not enough for the belligerent to say to the neutral, that because my right of capture is taken away, your trade is illegal. It is, undoubtedly, the interest of belligerents to consider all property bound to an enemy's country, as belonging to an enemy, and of course, exposed to capture and condemnation; *but they have no right; in order to effect this, to establish arbitrary rules of property; one encroachment leads to, and forms a precedent for, another, and if yielded to it is difficult to say where they will end.

There can be no doubt that the plaintiffs would have had a right to ship the cargo in question, not having made a contract for its sale, on its arrival in *France*. It was not contraband, nor bound to a blockaded port. What have they done, then, by this contract? Nothing more than to secure a market, on its arrival in *France*. What injury is done to belligerents? It is said, that their right of capture is taken away; and so it would have been, had the shipment been made, and no contract previously entered into. If abridging the chance of capture be sufficient to render commerce illegal, all trade by neutrals would be so. Sir *William Scott* gives us no authority to show that a contract, like the one before us, is illegal, according to the law of nations. For aught that appears to the contrary, the principle originated with him, or grew out of the special instructions of his government. He, however, says only that it is a rule of the prize courts, that the property going to be delivered in the enemy's country, and under a contract to become the property of the enemy immediately on arrival, if taken, *in transitu*, is to be considered as enemy's property. (3 *Rob.* 302. *The Atlas*, case of the *Sally*, *Griffiths*, note.)

If, by a rule of prize courts, he means only a rule of evidence, by which to ascertain the real owner, or that a cargo taken under such circumstances shall, *prima facie*, be consider-

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ed enemy's property, the rule, perhaps, may not be so exceptionable. But I cannot give my assent to it as a rule controlling the right of property. Property is, unquestionably, frequently transported under covered contracts, and, in this way, fraud is practised upon belligerents. It is not, therefore, matter of surprise that their suspicions should be excited. But it is no just reasoning to say, that because a transaction may be fraudulent, it is fraudulent. Every case must stand on its own merits; and I see nothing in the one before us, to warrant the conclusion, that this was a fraudulent, or covered transaction, or that the contract does not represent the truth, with respect to the ownership *of the property; if so, and this be a legal contract, as I have endeavored to show, I am at a loss to discover the grounds for saying there has been a breach of the warranty.

Fraud would, no doubt, vitiate the contract; and could I legally intend, from the facts stated in the case, that this was a speculation tainted with that malady, that the property had ever legally vested in the *French* merchants, and that the contract was a mere cloak, for the purpose of deceiving belligerents, I should, most certainly, withhold from it my sanction. If such had been the intention of the parties, why enter into a contract, which, upon the face of it, might have the least appearance of unfairness? If the contract does not represent the real truth of the transaction between them, security for their respective rights must depend on some private and confidential understanding; in which case the present contract would be idle and nugatory. If fraud is to be imputed to the parties, it must be an inference of law, arising from the contract; for nothing, *dehors* the agreement, is shown, in the least tending to such a conclusion, except that it was made during hostilities between *France* and *England*; and this does not appear to me sufficient to warrant the inference.

I see no impropriety in a *French* merchant's saying to an *American* merchant, If you will send your goods to *France*, I will purchase them of you, or to agree beforehand on a stipulated price, to be paid on their delivery in that country. The *French* merchant may not choose to run the risk of transportation, which the *American* merchant, for the sake of the profits arising out of the contract, may be willing to assume. I know of no law, nor any principle of reason or justice, that will deprive him of this privilege, provided the property continue, really, and *bona fide*, the property of the *American* merchant, until its delivery in *France*. According to my understanding of the case, then, its whole merits depend on the question, In whom was the property vested at the time of capture? And in whatever point of light I view it, I cannot resist the conclusion that it was in the plaintiffs.

My opinion, therefore, is, that they are entitled to judgment.

*KENT. Ch. J. There is no dispute, between the parties in this cause, as to the neutrality of the vessel. The affidavit of *John Jackson*, which was agreed to be received as part of the case, sufficiently establishes that she was *American* property. The great point is respecting the neutrality of the cargo. The question is, Who were the legal owners of the goods, after their shipment and consignment to the merchants at *Havre*, the plaintiffs or their consignees? The plaintiffs are directed by a *French* house, to purchase and transmit to them certain goods. They make the purchase, charge their commission for executing the order, and ship the goods, under a consignment to the *French* house. The freight, or expense of transmission was to be borne by the consignees, and the *risks* attending the transportation depended upon a special and peculiar agreement between the parties. This agreement deserves particular attention, as the merits of the cause will turn upon its construction, and legal operation. It is rather deficient in precision, but as I understand it, the plaintiffs expressly declare, that they were not to assume the usual sea-risks; but that they *ought* to make the insurance, in order to prove the property theirs, in case of capture; and that they would have to pay 2 1-2 *per cent.* for that insurance, and, consequently, they charge that advance to their correspondents. But they are to have a *commission* for the war-risks. This they ask as a premium for assuming that risk, or in other words, a belligerent *hires* a neutral, at a *commission* of 3 *per cent.* to take upon himself the war-risk; the neutral will not assume the usual sea-risk; that he expressly declines; but, in order to render this assumption of the war-risk less hazardous, he says the insurance must be in *his name*, and he charges only what he will have to advance, to effect it. The insurance was, therefore, an ordinary neutral insurance, estimated at 2 1-2 *per cent.* and the plaintiffs, no doubt, made it as *trustees* for the *French* merchants, for whose benefit it was to enure, if the property was lost by the perils of the sea. The plaintiffs, upon this agreement, were then to make a clear gain of 5 1-2 *per cent.* all of which they, emphatically, term their *commission*; part of *it was for their compensation, as agents, and the residue, as a premium for the war-risks they assumed. They ask no premium for the ordinary sea-risks, because it was agreed that they were to assume them; and, of course, those risks must be borne by the consignees, *who paid the insurance of those risks*, amounting to 2 1-2 *per cent.* This appears to me to be the real solution, the just analysis of this extraordinary contract. When, therefore, the plaintiffs, in the concluding part of their letter, speak generally of taking *all risks* and of receiving an allowance of 8 *per cent.*, this is easily explained, *reddendo singula singulis*, as the antecedent parts of the letter had particularly specified what risks were to be assumed by the plaintiffs, and by what means, and for what services, the allowance was to arise. *Generalis clau*

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sula non porrigitur ad ea quæ antea specialiter sunt comprehensa.

If we consider this contract, for a moment, independent of these singular provisions about the risk, the general rule of law would be, that the property vested in the consignees upon the shipment and delivery to the master. But as even this principle seemed to be questioned, upon the argument, it is proper to look into the authorities upon which it rests. A delivery to an agent, for, and on behalf of his principal, will transfer the property, equally with a delivery to the principal himself. This is an elementary rule in the transfer of property; and the master of a vessel is considered as the agent of the consignee. In the case of *Evans v. Martell*, (1 L.d. Raym. 271. 12 Mod. 156. S. C.) it was ruled by Lord Holt, and the Court of K. B., that if goods, by a bill of lading, are consigned to A., A. is the owner, and must bring the action against the master of the ship, if they are lost. So in the case of *Godfrey v. Furzo*, (3 P. Wms. 185.) the like rule was laid down by the attorney-general, and agreed to by Lord Chancellor King. It was there said, that on delivery of the goods to the master of the ship, the property immediately vested in the consignee, who was to run the risk of the voyage.^(a) The same point was noticed and recognized by Lord Chancellor Hardwicke, in the case of *Snee v. Prescott*, (1 Atk. 248.) in which he *admitted, that if goods are delivered to a carrier to be delivered to A., and they are lost, the consignee only can bring the action, which showed the property to be in him; and he said it was the same where goods are delivered to a master of a vessel, though he allowed, at the same time, the right of the consignor to stop *in transitu*.

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The right of stoppage *in transitu*, as between vendor and vendee, came from the Court of Equity. The first case in the books, is that of *Wiseman v. Vandepuut* (2 Vern. 203.) in chancery. On the first hearing, the chancellor ordered an action of *trover* to be brought, to try whether the consignment vested the property in the consignee; and it was then determined, in a court of law, that it did. But equity thought it right to interpose and give relief; and since that time this new rule of stoppage, *in transitu*, has been admitted in courts of law as well as equity, between consignor and consignee, in case of the insolvency of the latter, and before actual delivery. This rule, however, is not considered as altering the strict right of property which, by the old rule of law, vested in the consignee upon delivery to the carrier for him, and at his risk. The delivery to the carrier is a *constructive* delivery to the vendee, and the goods are considered in the possession of the vendee the instant they pass out of the possession of the vendor, to every other purpose but that of defeating this equitable right of reclaiming the property, upon the insolvency of the vendee. (*Buller, J*, in

(a) See *S. P. Summerill v. Elder*, 1 Binn. Rep. 106

Ellis v. Hunt, 3 Term Rep. 469.) In the late cases of *Oppenheim v. Russell*, and *Dutton v. Solomonson*, (3 Bos. and Pull. 48. and 582.) the Court of C. B. considered the rule as well settled as any in the law, that upon delivery of goods to any general carrier, the whole property immediately vested in the purchaser, subject to this right of stoppage, upon the insolvency of the purchaser.

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The only additional case that I shall mention is that of *Coxe v. Harden*, (4 East, 211.) in the K. B., and that will be found upon examination to be a very strong and pointed authority. It was upon a purchase by agents abroad under orders, and when the goods were shipped, the shippers drew upon their principals for the amount, in favor of third persons, payable *in sixty days, and gave notice, that they expected the bill would meet with due honor. The bill was transmitted at the same time, and in the same manner with the invoice and bill of lading, and the bill of lading was to the order of the shippers, and unendorsed. Under all these circumstances, however, the court had no hesitation in considering the property to have vested upon the shipment. They said, that a delivery to the master of a general ship, under a consignment, was a delivery to those to whom, and for whose use, the goods were sent, and at whose risk they were, during the passage; and that the property was subject only to be divested by the shipper's right of stopping *in transitu*, which they termed a species of *jus postliminii*. It was, indeed, contended, in that case, that as the bill of lading was unendorsed, and the bill of exchange for the amount transmitted concurrently, it showed that the shippers did not intend to convey the property, except conditionally, in case of the acceptance of the bill. But the answer was, that the shipment was at the risk of the consignee, without any such words of condition annexed. The same answer may be given to the like objection which the counsel raised, in this case, as the shipment here was in pursuance of orders, without any condition being annexed to the delivery, or shipment, relative to the furnishing of the guaranteed bills on London, and was, also, at the ordinary sea-risk of the consignees. This last risk they must be deemed to have borne, as the shippers here declared they were not to assume it, as it falls, of course, upon the consignee, without a special agreement to the contrary, as the consignees were at the expense of the insurance; and the party who is at the expense of the insurance, is clearly at the expense of the risk.

The recent decisions in the *English* courts, I consider as correct expositions of the common law, for they only illustrate more fully the same principles which we find recognized in the time of Lord Holt. We have not, nor ever had, any such rule in our law, as that to be found in the *civil* and *French* law, (*Inst.* 2. 1. 41. and *Pothier, Traité du Contrat de Vente*, n 322.) by which even a delivery does not *transfer the prop-

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erty without payment, unless a credit be given. It would have been necessary to apologize for thus multiplying cases to a point which appears to have been so clearly and permanently settled, had not this very question, In whom was the title after the shippers had consigned the goods and delivered them to the master? been much examined upon the argument, and very different conclusions suggested.

The question on the right of stoppage, *in transitu*, does not arise in the present case; and, if it did, it is admitted (3 *Bos. and Pull.* 43. 47.) that the right prevails only as between consignor and consignee, and does not affect the rights of third persons. The principle of the Court of *K. B.*, in the case of *Lickbarrow v. Mason*,^(a) is now considered (*Abbott*, par. 3. c. 9. s. 4. 4 *East*, 217.) as the true and settled rule of law; which is, that if the consignee assign the bill of lading for a valuable consideration, and without notice, the property is thereby transferred, and the consignor is divested of his right to stop, as against such assignee. The present case is to be considered in the same light as if it were a contest between the consignor and third persons, who, by the right of war, have succeeded to the interest of the consignee. A title by capture by an enemy of the consignee, in open war, is as valid as if it had been acquired by assignment, and equally puts an end to the claims of the shipper; because, taking possession by the captor is equivalent, in respect to the question of property, to an actual delivery to his enemy.

But we are told that the title to the goods is in him who bears the risk of the transmission. If that rule were to prevail equally in time of war as in peace, the present case would not be affected by it, for the risk was here *divided* between the parties. The plaintiffs took, by agreement, the war-risk, and charged a commission for it. The consignees were left to bear the sea-risk, and had it insured, at their expense, though the insurance was effected in the name of the plaintiffs, the better to secure themselves against the other risk.

The question, however, arises, whether the agreement to assume the war-risk was, in judgment of the law of nations, a valid agreement, as it respects the *claims of a belligerent captor. The *English* prize courts hold all such agreements, made in time of war, constructively fraudulent and void; and they will not allow a neutral and belligerent, by a special agreement, to change the ordinary rule in time of peace, by which goods, ordered and delivered to the master, are considered as delivered to the consignee. (3 *Rob. Adm. Rep.* 300. *in notis.* 2 *Rob. Adm. Rep.* 133.) The reason assigned is, that such agreements would operate so as completely to cover all

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(a) See in a note in 6 *East's Rep.* p. 21—36, the very elaborate opinion of Mr. Justice Buller, delivered by him, in the *House of Lords*, for reversing the judgment in error, given in the *Exchequer Chamber*, (1 *Hen. Black.* 357.) in this cause, in which the whole law on this subject is very fully examined. See, also, *Cuning v. Brown*, 9 *East's Rep.* 506.

belligerent property, whenever the neutral was disposed, or could be hired to do it, since the risk of capture would be laid alternately on the consignor or consignee, as the neutral factor should happen to stand in one or other of those relations. The admission of this practice would certainly afford great opportunities, and great temptations, to fraud.^(a) The admiralty principle takes a strong hold on the mind, since its object is to prevent fraud, and to cherish good faith, which is a fundamental axiom in the code of public as well as municipal law.

It is not requisite, however, to place this case within the reach of the decision in the case of the *Atlas*, (3 Rob. 300.) nor to assume the rule in the latitude it is there laid down; for the agreement before us strikes me as being fraudulent, *in fact*, and contrary to that candor and good faith which the law of nations requires. The goods were shipped in time of war, and the agreement appears to have been made, with an express and pointed reference to maritime capture. For what other purpose, I would ask, but to cover the property from capture, should the plaintiffs assume the war-risk, and ask for it a commission; and yet leave the ordinary sea-risk to be borne by the *French* merchants, or by insurances made at their expense? Why did the plaintiffs propose to make the insurance in their own names, but to blind the belligerents, or, according to their own emphatic language, to *prove the property theirs, in case of capture*? If these propositions, made and assented to, do not prove a collusive agreement to cover property, I should be at a loss to know what other combination of circumstances would amount to such proof. It appears to me, plainly and strongly, that they were made for that purpose, and no other; and that the agreement ought, therefore, to be deemed void. If so, it then results that *the property of the cargo was not American*, and that the warranty is broken.

LIVINGSTON, J., having been concerned as counsel in the cause, gave no opinion.

Judgment for the plaintiffs.

(a) See the practice of the *Hanburghers*, mentioned by Sir *Leoline Jenkins*. (*Life and Papers*, vol. 2. p. 725.) 4 Rob. Adm. Rep. 111—115.

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TUCKER against JUHEL and DE LONGUAMARE.

THIS was an action on a policy of insurance upon ten hogsheads of sugar, specified in the margin of the policy, on board of the ship *Charlotte*, at and from *Antigua* to *New-York*. At the trial before Mr. Justice *Radcliff*, at the *New-York*.
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Insurance on
10 hogsheads of
sugar from *Antigua* to *New-York*, the property warranted

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by the assured, "free from any charge, damage or loss, which may arise in consequence of seizure, or detention, for or on account of any illicit or prohibited trade or any trade in articles contraband of war." By a procla-

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mation of the government of Antigua, sugars were allowed to be exported in American vessels, on certain terms. The vessel arrived at Antigua on the 4th September, 1799, entered into the usual sugar-bond, began to load on the 12th September, but did not complete the lading and clear out before the 8th October. On the 4th September, an order was issued for revoking the permission to export sugars, but was not delivered at the custom-house, at St. Johns, in Antigua, until the 10th of that month. On an opinion given by the president of the island, that vessels who had already entered into the sugar-bond might be cleared out with their sugar, the vessel was cleared, and sailed on her voyage, when she was captured by a

York Sitings, the 10th April, 1802, a verdict was found for the plaintiff, for a total loss, subject to the opinion of the court, on the following case.

On the 23d day of October, 1799, the defendants underwrote the policy to the plaintiff, for 500 dollars, at a premium of 9 per cent. The sugars were valued at 1,600 dollars. The policy contained a printed clause of warranty, in the following words: "It is also agreed that the property be warranted by the assured, free from any charge, damage or loss, which may arise in consequence of a seizure, or detention, for or on account of any illicit or prohibited trade, or any trade in articles contraband of war." The insurance was effected by direction of the plaintiff, being the sole consignee, for and on account of *George Tucker*, a British subject, resident in Antigua, and owner of the sugar.

The bill of lading was dated at Antigua, the 5th October, *1799. The *Charlotte* was an American ship, and set sail on her voyage to New-York, on the 9th day of October, with the sugar and the residue of her cargo, consisting of rum, quicksilver and paper. She was captured on the 11th of the same month by a French privateer, and on the 14th of the same month, was recaptured by a British ship of war, and sent into Basseterre, in the island of St. Christopher's, where she arrived on the 18th of October. The plaintiff, having received information of the capture, on the 28th November, abandoned his interest to the defendants, stating as the cause, that the property had been captured by a French privateer, and carried into some port in the West Indies.

Proceedings were instituted in the Vice-admiralty Court of St. Christopher's, by the recaptors, on the 21st day of October, against the vessel and cargo for salvage. On the 23d day of November, the court decreed in favor of the recaptors, allowing them for salvage one half of the value of the vessel, with costs, and one eighth of the value of the cargo, with costs, and ordering the residue to be restored to the captain, as claimant. On the 23d October, an information was filed in the same court against the other half of the vessel, and the residue of the cargo, by the collector of the customs, and another officer *qui tam*, &c. for a breach of the laws of trade, in exporting sugar from Antigua after the 1st day of June, 1799. The court condemned the whole of the sugar on board for such breach of the laws, but restored the residue of the cargo, and the vessel, to the captain, on payment of costs.

From the proceedings of the Admiralty Court, set forth in the case, it appeared, that by a proclamation of the 6th of April, 1799, by the government of the island of Antigua, American vessels were allowed to export from that island, in exchange for certain articles imported, sugar, not exceeding one third of the cargo. The *Charlotte* sailed from New-York, the 7th of August, 1799, and arrived at Antigua, on the 4th of Sep-

tem¹. A bond, called the *sugar-bond*, required by the officer of the customs, was given, on a calculation made, how much sugar might be exported, according *to the regulation of the 6th of *April*, and the same was entered outwards for exportation. While the master was taking in his homeward cargo, and after about one third of his lading was on board, he heard that an order had been issued by the commander in chief, forbidding any sugar to be shipped in *American* bottoms. The master was told by his consignee, and at the custom-house, that those vessels which had arrived, and entered into the *sugar-bond*, before the order was issued, might proceed to complete their lading of sugar; and that the quicksilver and paper, being prize goods, might be exported. The master, accordingly, completed his lading, on the 8th day of *October*, 1799, and obtained the regular clearances at the custom-house, without any obstruction whatever. The order of the commander in chief, revoking the permission of the 6th of *April*, 1799, allowing the exportation of sugar to the *United States* in *American* bottoms, was dated at *Stapletons*, the place of his residence, the 4th of *September*, and enclosed under cover to *Edward Byam*, president of the island, at *St. Johns*, who received it the 10th of *September*, and on the same day delivered the letter, directed to the officer of the customs at that place. On the same day, or the day after, president *Byam* having been applied to, by the principal clerk of the customs, to know what was to be done in regard to such sugars as were shipped, or entered outwards to be shipped, before the order from the commander in chief arrived, he replied, that sugars in that situation, contracted for in payment for *American* commodities, might undoubtedly be cleared. Though the sugar had been entered outwards to be shipped, at the custom-house, before the receipt of the order revoking the permission to export that article, yet the master did not begin to load until the 12th of *September*, nor did he obtain his clearance for *New-York*, until the 8th of *October*.(a)

*Three points were insisted on, by the counsel for the plaintiffs; 1. That the exportation of the sugar was legal; 2. Admitting it to be illegal, yet it could not be seized and condemned at *St. Kitt's*, on board of an *American* vessel, after it had been exported from *Antigua*; and that the sentence of the court at *St. Kitt's* was unjust and a nullity; 3. That the loss was complete by the first capture, and no restoration had ever been made.

The cause was argued at the last term, by *Harison*, for the plaintiff, and *Hoffman*, for the defendants.

(1) President *Byam*, of *Antigua*, at the conclusion of his letter to the honorable *Thomas Norbury Kirby*, esquire, at *St. Kitt's*, in answer to some inquiries respecting the *Charlotte*, says, "I sincerely wish this information may contribute to the relief of those concerned in the ship *Charlotte* and her lading; which is the most rigorous, cruel case I ever remember."

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French privateer, recaptured by a *British* ship of war, and carried into *Basseterre*, in the island of *St. Christopher's*, where the vessel and cargo were restored on payment of salvage, but the sugar was afterwards seized and condemned as forfeited, for a breach of the laws of trade. It was held that, notwithstanding the vessel had regularly cleared out, the exportation of the sugar, after the revocation of the permission, was illicit, and so a breach of the warranty, contained in the policy against illicit or prohibited trade.

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THOMPSON, J., now delivered the opinion of the court. The claim in this case is for a total loss, by capture. The policy provides against subjecting the underwriters to any loss, which may happen by reason of any illicit, or prohibited trade. The right of the assured to recover will depend on the question, whether this was an illicit trade. The assured endeavors to bring himself within the permission given, by the proclamation of the 6th of April, 1799, in the island of *Antigua*, to allow the exportation of sugars, upon certain conditions.

The opinion given by President *Byam*, according to the judgment of the Court of Admiralty at *St. Kitt's*, was erroneous. The revocation, by the commander in chief, of the permission of the 6th of April, was general, containing no provision for cases like the present. The advice and permission of the president was altogether unauthorized, and the exportation of the sugar illegal. The condemnation, under the circumstances stated in the case, was, I think, extremely rigorous: it purported, however, to be bottomed on a breach of the laws of trade, which, in strict construction, was true. The loss has, therefore, been occasioned by a peril, not within the policy. The underwriters are exonerated from every loss, or damage which may arise in consequence of a seizure or detention for, or on account of any illicit or prohibited trade. That the seizure and condemnation was on account of a prohibited trade, cannot be denied. The case may be a hard one upon the assured; but his remedy, if any he has, is not against the underwriters. They have, by the policy, expressly *guarded against responsibility for losses on this account. The opinion of the court, therefore, is, that the defendants are entitled to judgment.

Postea to the defendants.

POST and RUSSELL against ROBERTSON.

A vessel was chartered for a voyage from New-York to St. Lucia, and back to New-York, for the entire sum of 2,750 dollars, 1,800 dollars of which sum was to be paid on the delivery of the outward cargo, the residue on the delivery of the homeward car-

THIS was an action of covenant on a charter-party, dated the 4th day of August, 1803, between the plaintiffs, as agents for the owners of the brig *Jefferson*, and the defendant, by which the plaintiffs granted, and let to freight to the defendant, the said brig, for a voyage from the port of New-York to the island of *St. Lucia*, and back again to New-York. On the part of the plaintiffs, it was covenanted, that the vessel should be ready and proceed on her voyage, and deliver the cargo, to be put on board by the defendant, to him, or his factors, or agents, at *St. Lucia*, &c., and receive and bring back a return cargo, and deliver the same at New-York, to the defendant or his agents. The defendant, on his part, covenanted to load

the vessel with a cargo, &c., (in the usual form,) and further, to pay the plaintiffs for the charter of the vessel, the sum of 2,750 dollars. It was also agreed in the charter-party, that, on delivery of the outward cargo at *St. Lucia*, the sum of 1,800 dollars should be considered as earned and due, and that a draft for that sum should be given by the consignee to the plaintiffs or their agent, at sixty days, and be accepted by the defendant, and that the residue, or 950 dollars, should be paid on the return of the vessel to *New-York* and the delivery of the cargo there.

The cause was tried on the 15th day of *December*, 1804, at the *New-York* *Sittings*, before Mr. Justice *Tompkins*, when the jury found a verdict for the plaintiffs, for 1,020 dollars and 74 cents, subject to the opinion of the court on a case, in which the above facts are stated. It was also stated, that the vessel received, and *delivered the outward cargo at *St. Lucia*, and that the draft for 1,800 dollars was delivered to the plaintiffs, and afterwards paid by the defendant, according to his stipulation; that the brig duly received on board her return cargo, consisting of sugars, and proceeded on her homeward voyage, towards *New-York*; that, after prosecuting about three-fourths of the distance of the return voyage, and while on the high seas, she was run against in the night of the 9th of *November*, 1803, by a vessel, by which the *Jefferson* received much damage in her hull, masts, spars and rigging, but did not leak. In this situation she was overtaken by the schooner *William*, bound for *New-York*, on board of which vessel the master and crew of the *Jefferson* were taken.

The master of the *William*, in his testimony given at the trial, was of opinion, considering the exhausted condition of the crew of the *Jefferson*, and her situation, that they were right in leaving her; but he added, that he offered to stay by, and assist the master and crew, if they would go on board again, which they refused. Four of the crew of the *William*, however, went on board the *Jefferson*, and safely navigated her into the port of *New-York*, with the return cargo, after a passage of eighteen days from the time they took possession of her. The four seamen libeled the vessel and cargo in the District Court of *New-York*, for *salvage*, and the cargo, consisting of eighty-three hogsheads of sugar, was sold pursuant to a decree of the court. Eighty hogsheads of the sugar were claimed by the defendant, for himself, and one *James Brown*, as consignees. Pursuant to the same decree of the court, one half of the net proceeds of the eighty hogsheads of sugar, amounting to 2,926 dollars and 48 cents, was paid to the libellants, for *salvage*, and the other half to the defendant, as the claimant.

It was agreed, that if the court should be of opinion that the plaintiffs were entitled to recover the whole freight, for the voyage from *St. Lucia* to *New-York*, according to the charter-

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go. The vessel on her return, having performed about 3-4ths of her voyage homeward, met with an accident, which induced the master and crew to abandon her. She was afterwards taken possession of by

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the crew of another vessel, and brought into *New-York*, where she was libeled for *salvage*, and restored on payment of half the proceeds, the cargo having been sold by order of the court; the other half of the proceeds was paid to the owner of the goods. It was held, that this was not such a delivery of the cargo, as would entitle the plaintiffs to maintain an action of covenant on the charter-party. (a) *Quære*, whether, in an action of *assumpsit*, they could recover any portion of the freight?

(a) *Welch v. Hicks*, 6 *Conn. Rep.* 504.

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party, then the verdict should stand, and judgment *be entered thereon. But if the court should be of opinion that the plaintiffs were entitled to receive a portion of the freight, less than the whole, then the amount of the verdict was to be reduced accordingly. Or if the plaintiffs ought not to recover any part of the return freight in any form of action, then judgment was to be entered for the defendant; but if the court should be of opinion that the plaintiffs were entitled to recover, but not under the present form of action, a judgment of nonsuit was to be entered.

This cause was argued at the last *November term*, by *Riggs*, for the plaintiffs, and *T. L. Ogden*, for the defendant.

The points raised by the plaintiffs, for the consideration of the court were, 1. That the arrival and delivery of the return cargo, in good order, at *New-York*, entitled the plaintiffs to the whole of the return freight; 2. If not to the whole, they were entitled to a moiety at least, as a moiety of the cargo had come to the use of the defendant; 3. The right of the plaintiffs to recover, either for the whole, or a part of the freight, rests on the charter-party, and that, under the circumstances of the case, the present was the proper form of action.

THOMPSON, J This is an action of *covenant* upon a *charter-party*, and one of the questions arising from the case, is, whether, under the circumstances stated, the plaintiffs can recover, if at all, in this form of action. From a view of the facts stated in the case, I think the plaintiffs' remedy for freight is not upon the charter-party. The contract of affreightment is an entire contract; and the general rule is, that unless it be entirely performed, by a delivery of the goods at the place of destination, no freight is due. (*Abbott*, par 3. c. 7. s. 1. p. 271.) This is the rule, I apprehend, however, only where the ship is chartered for a specific sum, for the voyage, as in the case before us. In such case the general rule is, that if part of the cargo be lost by perils of the sea, and part conveyed to the place of destination, there can be no apportionment of the freight, under the charter-party. (*Abbott*, 244.) "The cases in which a partial payment may be claimed, are exceptions *to the general rule, founded on principles of equity and justice, as applicable to particular circumstances." According to the terms of the charter, the freight is made payable on the delivery of the cargo. The delivery, therefore, is a condition precedent. And where a contract is entire, and the promise to pay depends on a condition precedent, to be performed by the other party, such condition must be performed before the other party is entitled to receive any thing. (6 *Term Rep.* 324. *Cutter v. Powell*.)

The case of *Cook v. Jennings*, (7 *Term Rep.* 381.) expressly decides, that when an accident has happened to the ship, and the goods are accepted at an intermediate port, covenant will

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not lie on the charter-party; but it must be a special action on the case, founded on the implied *assumpsit*, arising from the acceptance of the goods. (See, also, *Bright v. Cowper*, 1 *Brownlow*, 21. and *Clark v. Gurnell*, 1 *Bulst.* 167.) I am inclined to think that the plaintiffs are entitled to recover some freight, and that this ought to be in proportion to the amount of the goods received; because the right to freight arises altogether from the acceptance of the cargo, which raises an implied promise to pay. This was the rule adopted in the case of *Luke v. Lyde*; (2 *Burr.* 882.†) nor can any thing be more consonant to principles of justice and equity.

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† 1 *Black.* 190
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It is observable, also, that though it does not appear from the report in *Burrow*, what was the form of action; yet in the case of *Cook and Jennings*, Lord *Kenyon* states it to have been a general *assumpsit*, for the freight of goods, founded on an implied contract.(a) In the case of *Luke v. Lyde*, Lord *Mansfield* said, when the vessel is captured, and recaptured, and the salvage taken out, such part is deemed lost, and no freight payable for that; freight is only payable for the other half. It is a settled principle, that when a ship becomes accidentally disabled to prosecute the voyage, and the shipper accepts his goods, at any intermediate port, a *pro rata* freight is payable.(b) I see no reason why the same rule should not be adopted, when a part of the goods are accepted at the place of destination. Nor can it make any difference in principle, whether it be the goods themselves or the proceeds thereof, *which are thus accepted, according to the case of *Baillie v. Moudigiani*, (*Park*, 53.) But as it appears to me, that the present is not the form of action applicable to the case, my opinion is, that judgment of nonsuit must be entered.

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We cannot, I think, undertake to decide with respect to the conduct of the master and crew, in abandoning the vessel. That was a question which ought to have been submitted to the jury.

KENT, Ch. J., SPENCER, J., and TOMPKINS, J., were of the same opinion.

LIVINGSTON, J. Whether the plaintiffs be entitled to the whole, or any portion of freight, for the voyage from *St. Lucia* to *New-York*; and if they are, whether it can be recovered in an action on the charter-party, are the questions to which the facts before us give rise.

When we look into the contract, we perceive that payment of freight was, by mutual agreement, to depend "on the *Jefferson's* return to *New-York*, and a delivery of the cargo." Not-

(a) *Abbott*, 308. (3d ed.) note, says he examined the record in the case of *Luke v. Lyde*, and found it to be a general *assumpsit* for freight, for the carriage of goods in the plaintiff's ship, by sea, without mentioning from or to what place.

(b) See *Pinto v. Atwater*, (1 *Day's Cases in Error* 202—204.) *arguendo*. *Williams v. Smith*. (2 *Cuiner's Rep.* 21.)

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withstanding this express stipulation, ratified with all the solemnity which is supposed to attend the execution of an instrument under seal, the defendant is applied to for freight, although no part of the goods has been received, owing not to his fault, or refusal to take them, but to one of the perils, which excused a delivery altogether. Were we sitting here to make, not to expound and enforce contracts, it is possible we might contrive some relief for the plaintiffs; but having themselves agreed to ask no compensation, unless in the event of a delivery of the cargo, there can be no hardship in restricting them to terms of their own imposing, which very properly constitute a condition precedent in almost every charter-party. If the plaintiffs had been sued for not delivering the cargo, they would have found, in the terms of the contract, (the dangers of the sea being excepted,) a valid defence. Why then should not the same instrument be alone resorted to, in determining the defendant's responsibility? But he received a moiety of the net proceeds, and, therefore, it is contended, he is liable to pay at least one half of the freight. Without recurrence to authorities, let *us see whether this be reasonable. The proceeds were received about *two months* after the vessel's arrival at *New-York*, and after a sale at auction, which is generally attended with sacrifice. What the charges were in consequence of the libel, or what the property would have sold for on its landing, does not appear. Now, unless taking the price in this way, be always, and in every respect, equivalent to a receipt of the merchandise itself, this act of the defendant, which was a thing not of volition, but of necessity, can form no just criterion in judging of his liability. The sugars may have been intended for exportation, and the price of some foreign market may have been the only inducement to their shipment. This object, which we have a right to suppose was contemplated, has been entirely frustrated. The party may have been under contract to deliver them here, in which also he must have been disappointed: at any rate, he had an obvious interest in disposing of them in his own way, and on his own terms, and even this was not in his power.

It is impossible, therefore, under any view of this question, to consider a proportion of the net proceeds, cast upon him in this way, as beneficial as a timely and prompt possession of the goods themselves. Neither in fact, nor in contemplation of the parties, could it be so. No man in his senses would have agreed to pay freight under such circumstances. Nor can any argument be drawn, or a *new* promise implied, from this act of the defendant. What was he to do? The perils of the sea had prevented a compliance on the part of the owners of the ship; against them, therefore, he had no recourse. It was his duty, then, to rescue as much of the property as he could from the jeopardy which had intervened. Whether he was acting for himself, or as an agent for underwriters, or for

any one else, the claim he filed being a thing of necessity, should not prejudice, or involve him in any new or implied engagements with those whose charter-party was dissolved from the moment the vessel was abandoned.

It is, however, imagined, that this case is within the reasoning of certain decisions, allowing a freight *pro rata itineris*. If courts had not undertaken, on grounds of supposed *hardship, to interfere with contracts, which always proceed on an estimate of the very interruptions which have induced these interpositions, the construction of a charter-party would have been liable to no uncertainty. At present, however explicit and intelligible its terms may be, and however well the parties may have understood each other, it is difficult to know when freight is earned or not. It is in vain for the shipper to say to the master, or his owner, "You have not complied with the terms of your agreement; you have not carried my goods to the port of destination; on the contrary, you have landed them farther off than when put on board, and, therefore, you are entitled to nothing."

Though it be not denied that such was the bargain and clear intention of the parties; yet if, rather than let the goods perish, the merchant receives them, be it ever so distant from their port; and though, instead of being benefited, he may have received an irreparable injury, by the inability of the vessel to proceed, and would not on any consideration have shipped them, could he have foreseen the disaster, he must submit to pay a proportional freight in the very face of his agreement. However equitable this apportionment may appear, it will generally work injustice to the owner of goods. He may receive them at a port from which exportation is altogether impracticable, or very expensive, and may thus be forced to sell them at great loss, or be exposed to a second freight greater than the first, without having any remedy for the injury he has sustained.

If the master offer to repair his vessel, and to hire another, and the merchant insists on having his goods, then, and, perhaps, in that case only, should freight, and a full freight be allowed. It is on this principle, that Lord *Mansfield* seems to have proceeded in the case of *Luke v. Lyde*. Perhaps, however, it was going too far, to consider the merchant's not desiring the master to provide another ship, as equivalent to an offer on the part of the latter, to carry the goods to their port of destination. Though the present case does not resemble the one just mentioned; yet, as it has been cited, and is an authority as far as it goes, I cannot avoid observing, that to me it has ever appeared a very hard decision *against the defendant. There was not only a total end of the voyage to *Lisbon*, by reason of the capture and recapture, but the cargo was carried to a market it did not suit, and for which it was not intended; a freight, too, larger than the original sum agreed to

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be paid, was incurred to get it to *Spain*, and that after an immense salvage had been paid to the recaptors. What benefit, it may be asked, was done to *Lyde* by carrying his goods within sight of *Lisbon*, if, after all, they did not, and could not get there? If all these circumstances did not produce a dissolution of the charter-party, what is to have that effect? If *Lyde* had taken his goods out of the hands of the master, there might be some reason for adding to his other misfortunes, that of the payment of freight; but receiving them of the salvors in preference to a total dereliction, could never form the basis of a claim on the part of one, who had *entirely* failed in his contract, which was to *carry* them to *Lisbon*. It was a demand sanctioned neither by the contract, nor any one principle of justice.

How the form of action, for it was a *general assumpsit* for freight, could vary the essential rights of the parties, is equally incomprehensible; for, as Lord *Kenyon* observes, in remarking on this decision, which it is very evident did not meet his approbation, "What has the case of an implied, to do with an express, contract?" *Expressum facit cessare tacitum*. It may be added, What have the *Rhodian* laws, or the regulations in the *Consolato del Mare*, or the laws of *Wisbuy*, or the ordinances of *Lewis* the 14th, on which Lord *Mansfield* so much relied, to do with a plain and positive agreement between two merchants? They had a right, notwithstanding all such regulations, (which, if examined, will not be found to support the doctrine laid down in *Luke v. Lyde*,) to agree, that no freight should be paid, but on a completion of the voyage and *delivery* of the cargo. To interpret a charter-party made between two *British* subjects, by *French* ordinances, or by the municipal regulations of any other state, is not less extravagant, than it would be, in the parliament of *Paris*, to declare a contract made in *France*, and valid by her laws, null and void, because the parties had not conformed to the *English* statute for the prevention of frauds and perjuries. If an agreement contravene no law of the state, whereof the parties are subjects, and where it is made, that alone should be a guide in ascertaining their respective rights. The regulation of freight is as much an affair of municipal interference, and of private contract, as any other. There is no such thing as a law of nations on the subject; for every power legislates on this, as well as on other matters, as it thinks best.

I have ventured to express my disapprobation of the principles of this decision as a reason for not applying them to any other case in which can be discerned the smallest shade of difference. The more we confine ourselves to the agreement of parties, the less injustice will be done. We may be assured that they understood themselves, and would have provided for the payment of freight, in case of accidents like the present, if

they had intended that any thing, short of a delivery, should have subjected the defendant to this charge.

It has already been noticed how important, in most instances, it must be, to receive the goods themselves, and that we have, therefore, no right to say, that a moiety of the proceeds arising from a forced sale, and after various deductions, is as advantageous as the delivery of the article itself. Thus far, then, the case is not governed by that of *Luke v. Lyde*. In that case, a part of the goods were received; in this, only a part of the proceeds. Lord *Mansfield*, it is true, in *Baillie v. Moudigliani*,† says, that the "value of goods being restored in money, is the same as the goods, and, therefore, freight was certainly due *pro rata itineris*." But that case is since the revolution, and the only point in it was, whether the underwriters on goods were liable to their owner for the freight they had paid. In *Lutwidge and another v. Gray*,‡ there appears to have been an offer to provide another ship; when that is refused, there can be no hardship in making the party pay freight.

In *Blight and others v. Page*,§ Lord *Kenyon* only determined, that if a merchant will covenant to load a ship, which *becomes impossible by an act of government, he shall, notwithstanding, pay freight on the ground, that if he will undertake what he cannot perform, he shall answer to the party with whom he engages. I perceive no analogy between that case and the one before us. The owner of the vessel was ready to receive a cargo, and the merchant was considered in default. In one view, that case is favorable to the defendant, for it shows how strictly the merchant was held to pay, though he could not perform what he had promised. If we test the plaintiffs' claims by the same rule, what will become of them? They covenanted to *deliver the goods at New-York*; they have not done it, and yet ask payment.

At this rate, the merchant contracts on very unequal terms. If he cannot get a cargo, he must, nevertheless, pay freight; and if he obtains one, and the master is obliged to leave it by the way, even on a desert island, he must, if he or his agent touch the goods, also pay freight, though it may, afterwards, cost him ten times as much as the first sum he was to pay, to get them to their port. We cannot, then, without violating the plainest rules of law, without annulling a solemn and reasonable contract of the parties, and without manifest injustice to the defendant, say that any thing is due for freight, from *St. Lucia to New-York*.

It cannot be necessary, after being thus explicit as to the rights of the parties, to say any thing of the form of action. Nothing short of a delivery of the cargo at *New-York*, or some act which, in law, is equivalent, can be the foundation of an action on an instrument, which, on its very face, renders such delivery a condition precedent to payment. What fell from

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† *Park*, 55.

‡ *Abbott*, 250
part 3. c. 7. s. 13.

§ 3 *Bos. & Pull.* 295. in note.

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Lord *Kenyon*, in *Cook v. Jennings*, (7 Term Rep. 381.) must convince every one that freight, if any was due under the circumstances here disclosed, cannot be recovered in a suit on the charter-party. If I am right, it cannot be recovered in any way; and the defendant ought, therefore, to have judgment.

Judgment of nonsuit. (a)

(a) Mr. *Evans*, in his *Appendix to the translation of Pothier on Obligations*, (vol. 2. p. 47.) says, the rule that a person undertaking to carry goods to a certain port, to be paid an entire freight for the delivery of them, shall be entitled to a proportion of the freight, from whatever cause they are not delivered, except a prevention by the act of the party who is to pay, is in opposition to the general principle of *English law*, that an entire contract cannot be apportioned. But the laws of most of the maritime states of *Europe* allow of such an apportionment. See *Abbott*, part 3. c. 7. s. 10, 11, 12. and the notes.

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*J. and T. HOLMES and DRAKE against D'CAMP.

Where one of several partners dies, and the survivors continue to trade under the copartnership name, and an account is stated, afterwards, by a debtor, between him and the copartnership, admitting a balance due by him, for goods sold in the life-time of the deceased partner; the surviving partners may recover such balance, on an *insimul computassent*, without stating the death of the other partner, and the survivorship. The stating of the account is in the nature of a new promise to the survivors. If a negotiable note or bill of exchange, be given for a simple contract debt, the party cannot recover on the original contract unless

THIS was an action of *assumpsit*, tried before Mr. Justice *Livingston*, at the *New-York Sittings*, the 27th day of *September*, 1804. The declaration contained the usual counts for goods sold and delivered, money had and received, &c., and an *insimul computassent*. The defendant pleaded *non assumpsit*; with a notice of the special matter intended to be given in evidence, under the general issue.

It appeared that the plaintiffs, and a person by the name of *Charles Holmes*, who died in *May*, 1801, were for some time before, partners together in trade, under the firm of *Charles Holmes and Co.*; that the defendant knew of the death of *Charles Holmes*, at, or about the time it happened; and that the plaintiffs, afterwards, continued their business, under the same firm. The plaintiffs produced an account current, stated by the defendant, between him and *Charles Holmes and Co.*, in which a balance of 532 dollars and 90 cents was admitted to be due to them from the defendant, on the 21st of *September*, 1802. The plaintiffs, by their agent, in *August*, 1802, made a settlement with the defendant, of an account they had against him and a person by the name of *Seymour*, trading together under the firm of *Seymour and D'Camp*, by taking notes for fifteen shillings in the pound, for the debt. At that time, the amount due from the defendant could not be ascertained, as it depended on the result of certain shipments, made to *New-Orleans*. As to the amount of that account, the defendant declared, that he wished for no deduction and would settle it in a short time.

Upon this evidence of the plaintiff, the counsel for the defendant moved for a nonsuit, on the ground, that the goods for

which this action was brought, were sold in the life-time of *Charles Holmes*, who was a partner, and whose name did not appear in the declaration. The judge was inclined to grant the nonsuit, but as it appeared that the defendant, in his notice annexed to the *plea, had a defence on the merits, he thought it proper to reserve the question.

The defendant then produced in evidence, a power of attorney given by the plaintiffs, and several other creditors of *Seymour and D'Camp*, dated the 26th of *August*, 1802, authorizing *T. Dwight*, Esquire, of *Hartford*, to compound and agree with *Seymour and D'Camp*, for their respective debts, and to take such securities for such parts thereof as he should deem best for their interests, and to execute releases and discharges for the same. The defendant further proved, that the attorney of the said creditors took from one *Edward Seymour*, a mortgage, dated the 15th of *October*, 1802, to *John and N. Griffiths*, as trustees for the plaintiffs and the other creditors, as security for the several debts due from *Seymour and D'Camp*, and also for the debt for which the present action was brought, payable in three years from the first day of *September*, 1802. The defendant then offered to prove, that it was understood by the creditors who gave the power, that it authorized the settlement of this debt, as well as the joint debts of *Seymour and D'Camp*, which testimony was overruled by the judge.

The defendant, also, produced a written paper, by which it appeared that he had, on the 19th of *January*, 1801, given to *Charles Holmes and Co.* his promissory note for the goods sold and delivered to him, for which the balance was now claimed by the plaintiffs. This proof was objected to by the plaintiffs; but the judge observed, that if a negotiable note had been given, and was not produced, he should consider it as a bar to the action on the implied *assumpsit*. The plaintiffs then produced the note.

The jury found a verdict for the plaintiffs, for the balance of the account with interest.

The counsel for the defendant moved to set aside the verdict, and that a nonsuit should be granted, for the following reasons: 1. That *Charles Holmes*, being a partner with the *plaintiffs, at the time the goods were sold to the defendant, his death should have been stated, and the plaintiffs have brought their action as survivors.

2. That the note ought to have been declared on.

3. Because the power of attorney and the proceedings under it, show that this debt was secured by a mortgage, not due when the suit was commenced.

This motion was argued at the last term, by *Emott*, for the plaintiffs, and *Evertson*, for the defendant.

SPENCER J., now delivered the opinion of the court. If there had been no count in the declaration on an *insimul com-*

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he shows the note to be lost, or produces and cancels it at the trial. (u)

(a) *Angol v. Fulton*, 8 Johns. Rep. 149. *Pintard v. Tuckington*, 10 Johns. Rep. 105. *Burdick v. Green*, 15 Johns. Rep. 247. *Hughes v. Wheeler*, 8 Cow. Rep. 77. *Raymond v. Merchant*, 3 Cow. Rep. 147.

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putassent, I should have considered the first exception as fatal notwithstanding the cases cited by the counsel for the plaintiffs. (*Smith v. Barrow*, 2 Term Rep. 476. *Slipper et alia v. Stedstone*, 5 Term Rep. 493. *French v. Andrade*, 6 Term Rep. 582.) On examination, those cases will be found not to contradict the proposition, that in declaring on a debt contracted with the plaintiffs and another, since deceased, his death, and the survivorship of the others, should be alleged; for, otherwise, it would not appear to be the same promise.

The defendant, in September, 1802, stated an account exhibiting the balance due from him, claimed by the plaintiffs. Formerly, the stating of an account was considered so deliberate an act, as to preclude any examination into the items. (*Truman v. Hunt*, 1 Term Rep. 40.) A greater latitude has of late prevailed, and any errors may be shown and corrected; but still the stating of an account is regarded as a consideration for the promise; and it is in the nature of a new promise.

Technically speaking, a negotiable note is not an extinguishment of an antecedent debt; yet it has been deemed an extinguishment *sub modo*. In the Court of King's Bench, (2 Bac. Abr. Debt, G. 290. *Gwillim's* edit. See, also, *Bac. Abr.* vol. 1. 281. note, and *Kearslake v. Morgan*, 5 Term Rep. 513.) a negotiable note or bill of exchange has been held to *be an extinguishment of a simple contract debt, the defendant being liable to pay the money to a third person. Though this principle is not to be found in any adjudged case, yet it is so reasonable and necessary a rule, in a commercial country, that I am disposed to adopt it, with this qualification; that where a negotiable note has been given for a prior debt, not to suffer the plaintiff to recover on the original consideration, unless he shows the note to have been lost, or produces and cancels it at the trial.

The power of attorney to Mr. *Dwight* did not, in its terms, authorize him to compound or take security for the debt in question; and the testimony offered, to prove that it did give him that authority, was of the most slender kind, the mere understanding of the general creditors of *Seymour and D'Camp*. The judge, at the trial, very properly rejected this evidence; and if the plaintiffs will now stipulate to cancel and file with this court, the note given to them by the defendant, the present motion ought not to prevail, otherwise, I think it ought to be granted. (a)

Judgment for the plaintiffs.

(a) The counsel for the plaintiffs produced the note, canceled, and filed it with the clerk. See *Bernard v. Wilcox*, (2 Johns. Cas. 374.) A surviving partner may maintain a suit in his own name, for a debt due the partnership.

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THIS was a special action on the case. The declaration stated the defendant to be the attorney of the plaintiff; that in consideration of a certain reward he promised to put out such moneys belonging to the plaintiff, as came into his hands, on bond and mortgage; but that he failed and neglected so to do, by which means the money was lost, &c. *Non assumpsit* was pleaded, and the cause was tried before Mr. Justice *Livingston*, at the *New-York Sittings*, the 25th of *June*, 1804, when a verdict was found for the plaintiff, subject to the opinion of the court, on the following case:

The defendant was attorney in fact for the plaintiff, who resided at *Charleston* in *South Carolina*, under a power, dated in 1791, to receive, from time to time, all moneys due to the plaintiff, in the state of *New-York*, for which he was to receive the usual commission. He received various sums, at different times, under the power, and being in partnership with *Jacob Mark*. The moneys were entered in the books of account, kept by the partnership of *Jacob Mark & Co.*, but all correspondence relative to the plaintiff's affairs was carried on with the defendant alone, except at one period, when he was absent.

Numerous extracts from the correspondence between the plaintiff and defendant, were inserted in the case, which it is unnecessary to detail. They tended to show a negligence in the defendant, as the agent of the plaintiff, in not having the money duly secured, pursuant to the instructions of the plaintiff, and his own engagement.

Mark & Speyer became bankrupts, and were regularly discharged under the act, in the month of *October*, 1800. On their examination before the commissioners, they stated the plaintiff to be "a creditor for 1,400 dollars, which was to have been secured by a mortgage." By a deed of lands in trust on the 2d of *December*, 1799, and by another of the 31st of *May*, 1800, they had secured several of their creditors, to a large amount.

Mark deposed, that he entered into partnership with the defendant in 1792, when the defendant was attorney in fact to the plaintiff; that the plaintiff was informed of the connection, and her accounts were kept in the books of the partnership; and that accounts current between her and *Jacob Mark & Co.* were sent to her annually; that from the tenor of the plaintiff's letters, in answer to the defendant, *from *June* to *August*, 1798, he and the defendant considered the plaintiff as authorizing the *deferring* of the execution of the securities for the 1,400 dollars, until a further sum was received, so as to include all in one mortgage, and that this was the reason of the delaying the execution of the securities; that on the 3d of

In a special action on the case against a bankrupt, who had received money prior to his bankruptcy, under a promise

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to put it out, on bond and mortgage security, but neglected to do so, it was held, that he was not liable, even in this form of action, but that the demand was barred by the bankrupt's certificate, it being clearly provable under the commission.

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August, 1799, the partnership of *Mark & Co.* was dissolved, and *Mark* engaged to take all the partnership property, pay all the debts, particularly the one due to the plaintiff, and to allow the defendant 10,000 dollars for his interest in the joint estate; that circular letters were sent to the creditors, informing them of the dissolution of the partnership, and that *Mark* had undertaken to pay all the debts; that one of these letters was sent to the plaintiff as a creditor, and adding that security would be given for the debt, if she would give further time for the payment.

The plaintiff wrote to *Mark*, the 28th of *January, 1800*, and in the letter acknowledged the receipt of the circular letter of *Mark & Co.*, and that, as she was informed he was to settle the partnership debts, she hoped he would exert himself to pay her, and was willing to grant him a short indulgence for that purpose.

The plaintiff claimed 1,400 dollars principal, with interest.

This cause was argued at the last term by *Pendleton* and *Bunner*, for the plaintiff, and *Jones*, for the defendant.

Two points were insisted on by the plaintiff's counsel.

1. That a claim for damages for misconduct of an attorney, by which the plaintiff lost the money intrusted to his management, is not a debt from which the defendant is discharged by the bankrupt act.

2. That as the interest on the contract was payable half-yearly, the damages ought to be ascertained by calculating the interest half-yearly, and adding it to the principal, from *November, 1798*, when the last interest was paid.

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*LIVINGSTON, J., now delivered the opinion of the court. On the trial of this cause, I thought the demand barred by the proceedings under the bankrupt act. This opinion was expressed at the time; but the parties chose, without my intervention, to make a case which presents for decision a question of some importance, but of no great difficulty: Whether a person, who has received money prior to his bankruptcy, under a promise to put it out, on bond and mortgage, and which he failed to do, be liable, notwithstanding his certificate, in a *special action on the case*, for such neglect. This is stating the question in its most favorable aspect for the plaintiff; for it may be doubted whether, being early apprized of her money's not being placed in this way, she did not approve and ratify her agent's conduct. But I am willing to meet the question as here put, being satisfied, after considerable reflection, that the defendant is protected from any suit that can be brought against him, on account of his dealings with the plaintiff.

A bankrupt, being compelled to surrender all his property for the benefit of creditors, and having done so fairly, is entitled, and such is one object of the law, to be protected against the claims of all, who were creditors *before* the act of bankruptcy. He is, in the terms of the act,† “discharged

† L. U. S. vol.
5, p. 69. (6 Cong.
1 sess. c. 19.)

from all debts due by him, at the time he became bankrupt, and from all which were or *might have been proved* under the commission." Now, if this demand could have been proved, what right have we to repeal the statute, and hold the party liable? It was admitted, at least it was not denied, that an action *for money had and received*, might have been brought, and that then the certificate would have been a bar. This involves in it another admission, which is, that the sum in controversy *might* have been proved under the commission, and thus brings the defendant's case within the letter of the act. But plain and imperative as its tone is, because the plaintiff has had ingenuity enough to resort to a special action, it is expected that we are to pronounce the discharge a nullity, and to render the bankrupt liable for an old debt. In this *action, it is supposed, the damages are so very uncertain, that they can only be settled by a jury, and, therefore, not susceptible of proof before commissioners; and that a bankrupt's discharge does not depend on the intrinsic merits, or real nature of the demand, but on the form in which his adversary shall elect to sue him. What was meant by the contingency, or uncertainty of this demand, and its difficulty of liquidation, I could not understand. Its payment depended on no future, or doubtful event; the plaintiff, at the time of the bankruptcy, could have sworn to what was due. No claim can be of more easy, or prompt liquidation, whether the one or other form of action can be pursued. The sum received, with interest, was all that could be recovered in any way; and if compound, instead of common interest, were allowed, only a few more figures would be necessary. Here, then, could occur nothing of that uncertainty, which is a hindrance to making proof under a commission, and by which is intended a difficulty, from the nature of the demand, in determining, without a trial, what damages the party is entitled to.

It would have been better, and more consistent with the spirit of a system of bankrupt law, and the humanity due to debtors, to have excluded from proof such claims only as were contingent, or as originated in *torts*; as actions for assault and battery, trespass on land, slander, and the like, in which the damages, instead of being governed by certain and known rules, depend almost entirely on discretion, and are so arbitrary that the party, if left to his own oath, would be totally at a loss to fix the amount. This appears to have been the understanding of Mr. Justice Buller, who, in *Johnson v. Spiller*,† observes, "that it is not to be taken for granted that a demand in *trover* cannot be proved under a commission; where the demand can be liquidated, it may. It is *only personal damage*, as for an assault, &c., that cannot be proved." But extensive as the exclusion has become, it is very certain that there is yet no obstacle to proving a debt, originating in the receipt of money to another's use.

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† 1 Doug. 167
in note.

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another.

It only remains to see whether, by recurring to a particular form of action, the bankrupt may be placed at the mercy of creditors. It would be somewhat extraordinary, *if a positive and plain injunction of a statute could be frittered away in this manner, or that the substantial right of any party should be varied, if not prostrated, by an option, left with those whose interest and feelings naturally lead to an abuse of it. I should struggle hard, could any authoritative precedent be produced, to get rid of it; but none exists. The only rule prescribed being the practicability of proving a debt under a commission, it will be unsafe to resort to any other, especially to one which can only mislead, by concealing from view the true and essential merits of the case.

† Doug. 584.

‡ 6 Term Rep.
695.

It is said, however, that Lord *Mansfield* broke in upon the rule in the case of *Goodtitle v. North*,† and considered the form of the action, as the only test of a bankrupt's liability. Nothing more was decided in that case, than that bankruptcy was no plea to an action of *trespass* for *mesne profits*, on account of the damages being so uncertain. It is true, Lord *Mansfield*, in giving his opinion, does say, "The form of action is decisive," which principle is also recognized and adopted in *Parker v. Norton*,‡ where trover was brought for a bill of exchange, and a bankruptcy, which happened after the conversion, was held to be no defence, though it was conceded that it would have been so, if the action had been for money had and received. Of these cases, it is sufficient to say, that neither of them has any binding force here, and that the reasons on which they proceed are not such as to induce us to adopt them. It is refining away one of the most important provisions of the bankrupt law; it savors of extreme hardship towards unfortunate debtors, and establishes a mode of reviving suits for old demands, which, with a little ingenuity and fiction, may be extended to almost every debt a merchant may owe at the time of his bankruptcy. Judgment must be entered for the defendant.

Judgment for the defendant.

M'DOUGALL against A. & W. SITCHER and WEEKS

A purchaser
of real estate,

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under a *fiery fu-*
ria, may enter
and take pos-
session of the
premises in a
peaceable man-

THIS was an action of trespass *quare clausum fregit*, for entering the house of the plaintiff, in the city of *New-York*. *It was tried before Mr. Ch. J. *Lewis*, at the *New-York Sit-*
tings, the 11th day of *April*, 1803.

In *September*, 1801, about a week before the trespass com-
plained of, the plaintiff was taken in execution, and confined
within the limits of the gaol in the city of *New-York*, where

he remained with his family at the time of the supposed trespass. By his direction, a label, or removal-plate, was put up, on the outside of the door of the house in question, informing the public that he had removed. During the time, however, his apprentices continued daily at the shop, which is the *locus in quo*, employed in the business of the plaintiff, and they shut up and locked the house every evening when they left it. In the morning, after the apprentices had so left the house, the defendants were found in possession, and the lock appeared to have been forced from the door. The plaintiff, who is a painter and glazier, left property, consisting of paints and glass, of a considerable value in the house. The goods, or a greater part of them, were afterwards sent to the plaintiff, by order of the defendants.

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ner, though some goods of the former proprietor are left on the premises. and though they may be occasionally occupied by his servants. (a)

(a) *Orser v. Storms*, 9 Cow Rep. 687. See *The People v. Nelson*, 13 Johns 340.

The defendants offered to give in evidence, in justification, that previous to the supposed trespass, the premises in question were sold by the sheriff, under an execution against the plaintiff; that one *Ebenezer Clark* became the purchaser, by whose license and authority the defendants entered; and further, that one of the defendants derived a title to the premises from such sale, and that the other defendants entered with him as his servants. This evidence was overruled by the judge, and the jury found a verdict for the plaintiff, for 40 dollars damages.

A motion was made to set aside the verdict, 1. For the misdirection of the judge; 2. Because the verdict was against evidence.

The cause was argued at the last term, by *Colden*, for the plaintiff, and *Evertson*, for the defendants.

LIVINGSTON, J., now delivered the opinion of the court.

May the purchaser of real estate, under a *feri facias*, enter on it in a peaceable manner, though some goods of the former proprietor, who was the judgment debtor, be left on the premises, without being answerable to the latter as a trespasser?

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This is a suit not entitled to much favor, and unless some very inflexible rule require it, the *postea* should not be permitted to pass into the plaintiff's hands. Fortunately, however, no such rule exists. Under such sale, the plaintiff's interest which may have been a fee-simple, for aught that appears, vested in the purchaser: a right of entry was, of course, acquired; and in an ejectment, the judgment and sheriff's deed would have been conclusive against *M'Dougall*. Under an *elegit*, though the land be not delivered to a plaintiff, he may enter without waiting until the sheriff receive a *liberate*.† Why then should not the same course obtain on a *fi. fa.* where the property, instead of being extended, is absolutely sold? The goods which were left could not prevent the entry's being peaceable. They were incapable of resistance, and, therefore, no breach of peace could ensue. If it had, the defendants might, perhaps, have been indicted; but this

† *Roll. Abr.* 378.

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† 2 Str. 1063.

would not have rendered them trespassers on a party, who had no longer any interest in the *locus in quo*. At any rate the entry must now be intended to have been peaceable, as all the proof to that point was overruled. The case of *Savage v. Dent*,† proves only, that beer being left in a cellar, the house could not be proceeded against, as a *vacant* possession; but whether the landlord's sealing a lease on it *as such*, made him a trespasser, did not come in question. A court would hardly have considered a barrel of ale, stowed below, as capable of defending a dwelling-house against intruders. We have heard, in this country, of a battle of kegs; but with poetical fictions we have nothing to do.

If necessary, we might ask, how it appears that any goods were on the premises? It is true, one witness said so; but if the defendant's testimony had been admitted, who can say this might not have been disproved, if such dereliction were requisite to render an entry peaceable? But admitting the fact, it would not, perhaps, be too much to say, that where the debtor himself is in possession, a sheriff would have a right* to turn him out, and put in a purchaser. Without, however, going this length, which is not essential to a decision of the point before us, it is not risking too much to say, that a purchaser at a sheriff's sale may enter upon the property left in the situation this was, by one who was defendant in the judgment; and that he may retain the possession, and plead it to be his soil and freehold to any suit brought by the debtor. There must, therefore, be a new trial, with costs to abide the event of the suit.(a)

New trial granted.

(a) See *Taylor v. Cole*. (3 Term Rep. 392.) This was an action of trespass against a sheriff for breaking and entering a house, and expelling the plaintiff. The defendant justified under a *fi. fu.* by which he sold the interest of the plaintiff in the premises to one Harris, who afterwards peaceably entered and expelled the plaintiff. The Court of K. B. held that a purchaser, under a sheriff's sale, on an execution, might peaceably enter and retain possession, and might plead that it is his soil and freehold; that whoever had a right of entry could not be considered as a trespasser for asserting that right, unless he did it *by force*. The common plea of *liberum tenementum*, proved this. Buller, J., was inclined to think, that the sheriff on the *fi. fu.* might turn the debtor out of possession.

In the case of *Jackson, ex d-m. Kane, v. Sternbergh*, decided in this court in October term, 1799,† it was held, that a purchaser of lands, at a sheriff's sale, under a *fi. fu.* might maintain ejectment, the debtor in possession being considered by the sheriff's sale *quasi a tenant at will* to the purchaser, and that in such a case, no adverse possession would be presumed.

† Since reported in 1
Johns. Cas. 153.

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*Foot against TRACY.

In an action for a libel, can the defendant give in evidence, under the general issue, the gene-

THIS was an action for publishing two libels, concerning the plaintiff, in the *Lansingburgh Gazette*. The cause was tried before Mr. Ch. J. Kent, at the Albany circuit, in October, 1804. The declaration contained two counts; one for a pub-
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lication on the 3d of *May*, 1803, of the following words: "The character of the *wretch* is too well known to require a description; every lineament of his countenance reminds the beholder that he was not born to be drowned." The other count was for a publication on the 16th *August*, 1803, of the following words: "Yet these are cases which, by a commissioned pettifogger of the lowest grade, are represented as being in analogy with that of Mr. *Croswell*, and which, to deceive a too credulous public, he has ushered to them through the foul swillage of a mercenary, drunken, subsidized renegade." The defendant pleaded *not guilty*. The publication was admitted, and the innuendos proved.

The defendant then offered to prove the *general character* of the plaintiff, both as a lawyer, and a man, to be so bad, as not to entitle him to more than mere nominal damages, which evidence was overruled by the judge.

The jury found a verdict for the plaintiff, for 200 dollars damages.

A motion was made for a new trial, for the misdirection of the judge who tried the cause, and the same was argued, at the last term, by *Emott*, for the defendant, and *Woodworth*, Attorney General, and *Edwards*, for the plaintiff.

THOMPSON, J. This is an application for a new trial, on the ground that the defendant was not permitted to give evidence touching the general character of the plaintiff. The action was for publishing a libel, and the single question presented is, whether, in such case, it be competent for the defendant to go into evidence of the plaintiff's general character.

I have had some difficulty, in making up an opinion on this question. The researches of counsel have not been able to furnish us with much aid from adjudged cases, and our practice at circuits has not, I believe, been uniform on the subject. We are left, therefore, pretty much at large, to establish such a rule, as will be the most just, and analogous to the general rules of evidence. There can be little doubt, that the character of a party prosecuting an action like the present, is of some importance, in estimating the measure of damages. Actions of this description are, in judgment of law, brought to recover damages for a real, or supposed injury, to the reputation of the party libelled. It cannot be just, that a man of infamous character should, for the same libellous matter, be entitled to equal damages with the man of unblemished reputation; yet such must be the result, unless character be a proper subject of evidence before a jury. It would not be competent for the defendant to plead such matter, and thereby put in issue the plaintiff's character; and it is a settled rule of evidence, that whenever a party cannot have advantage of the special matter by pleading, he may give it in evidence on the general issue. (*Willes*, 24. *Smith v. Richardson*. *Bull. N. P.* 298.)

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ral character of
the plaintiff
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of damages?
Quare. (a)

(a) That he cannot where a particular charge is made, see *Root v. King* at 7 Cow. Rep. 613. *Matson v. Buck*, 5 Cow. Rep. 499. But where the plaintiff is charged generally with felony, such evidence is admissible. *Paddock v. Salisbury*, 9 Cow. Rep. 811.

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The doubt with me has been, whether the inquiry ought to extend to the general character of the party, or be restricted to his character in the capacity in which he has been libelled, considering it analogous to an examination into the character of a witness. The question, in that case, is not as to his character at large, but as to his general character for truth and veracity. The result of my reflections, however, is, that the general character should form the subject of examination. The character of the plaintiff comes in collaterally, and is not directly put in issue. To confine the inquiry to the particular character of the party, in the capacity in which he has been libelled would be, in some measure, infringing upon a well settled rule, that under the general issue the truth of the words cannot be given in evidence in mitigation of damages. (*Underwood v. Parks*, 2 *Stra.* 1200. *Smith v. Richardson, Willes*, 20.)

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In the case of *Dennis v. Pawling*, (12 *Vin. Abr.* 159. *pl.* 16.) Baron *Price*, before whom the case was tried, said *he would not allow any *particular credit* of the plaintiff to be given in evidence; but if the defendant had a mind to examine to this, the question must be asked in *general*.

As the legal intendment is, that the action is brought to repair an injury done to a person's character, in the estimation of the public, the jury must be left very much in the dark, in making a just reparation in damages, without being furnished with some *data*, by which to estimate its value, and susceptibility of injury. Though the inquiry into general character may be, in some measure, vague and uncertain, and in some cases may lead to abuses; yet I have adopted it, as being the least exceptionable course. Such inquiries may be legally made of witnesses, as to enable the jury justly to appreciate the sources from which they form their opinion of the general character of a party, and thereby prevent very great evil or imposition.

I am, therefore, of opinion, that the verdict should be set aside, with costs to abide the event of the suit.

LIVINGSTON, J. On the argument, I was much struck with some of the reasons which were urged in favor of a general inquiry into character; but am now satisfied that these impressions were incorrect, and that more mischief will follow from an adoption of such a rule, than by excluding the investigation altogether, except when presented as a complete justification, in the form of a special plea. It was conceded, that for that purpose, the evidence under this plea could not be offered, except only in mitigation of damages. But where is the essential difference between nominal damages, and a verdict for the defendant? The plaintiff is as much out of pocket, and his reputation as far from being repaired, in the one case as in the other. To this it is answered, that a person of bad fame

has no right to bring a suit, or if he does, that he cannot expect the same compensation as those who have a character to lose. But no one, however low a man's reputation be, has a right to publish slanders of him, or to charge him with crimes of which he is innocent. If he confines himself to the truth, he can plead it; but if he will deal in general invective, or indulge his wit and venom, by travelling out *of the record, he must abide by the consequence. Nothing is better settled, than that the truth of a libel, or of slander, cannot be relied on, in justification, unless pleaded. What is not permitted then directly, ought not to be tolerated in any other way. If this be allowed under the general issue, it will not only have a tendency to justify, but, in effect, amount to the same thing, and that without legal proof of any one fact.

Nothing can be inferred from the silence of the *English* books. The law in *Great Britain* may be regarded as well settled, and then the question would not occur. The cases in slander, as far as they go, and the reasons of them, apply to libels, and are opposed to the admission of such testimony. No decision, it is true, can be found, of the question, how far general reputation is proper evidence on not guilty, in slander, but the twelve judges, in the case of *Smith v. Richardson*, (*Willes*, 20.) were unanimously of opinion, that where words import a felony, the truth could not be given in evidence under the general issue, in mitigation of damages, which rule was afterwards extended to every species of slander, and not barely to such as imported a charge of felony. (*Underwood v. Parks*, 2 *Stra.* 1200.) Now if the truth of a slander may not be shown in mitigation, *a fortiori*, evidence of general reputation, which is only another way of making the jury believe that the defendant has published nothing but the truth, ought to be rejected; for it would be absurd to shut our ears against positive evidence of a fact, and yet listen to circumstantial proofs. Nor is it any reason for permitting the inquiry, that a man is always prepared to support his general character. This is not only not true in point of fact, but not being in issue, the plaintiff is no more bound to bring witnesses to repel an attack of that kind, than a refutation of the charge which gave rise to the suit. Baron *Price*, (*Dennis v. Pawling*, 12 *Vin.* 159.) on a trial before him, would not allow any thing to be given in evidence, which tended to justify the words, though in mitigation only.

One of the questions, which was overruled here, was manifestly improper. It went directly to prove the plaintiff a pettifogger, which was part of the libel complained of, *and the truth of which was not pleaded. In another part of the publication he was called a "*wretch*," and if the defendant had been permitted to prove him void of *morals*, *honesty* and *integrity*, this accusation would also have been completely proved, and, perhaps, in the only way such a charge could be made

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out. It was said, this proof ought to have been received, because the truth of these charges could not be pleaded. If so, it was the defendant's own fault to make them, and is no reason why the plaintiff should be surprised, or the rules of evidence subverted. But this difficulty was only imaginary. It was easy to plead, that he was a pettifogger, and, perhaps, it would have been competent, to have disclosed, in the same way, *particular facts of dishonesty* in the plaintiff, which might have justified his applying to him the other harsh epithets made use of; but without giving an opinion on this point, the answer already made to this difficulty, if it be real, is, that it is a dilemma of the party's own creating. If it were a reason for examining into general character, the most atrocious libel might be published, and the party defend himself, not by proof of any particular charge, or improper conduct, but by a species of testimony, springing, perhaps, from political or religious intolerance or bigotry, and always too general and equivocal, if not too easily procured, to afford much satisfaction.

The case of *J. Anson v. Stewart*, (1 Term Rep. 748.) virtually involves a decision of this question, and though no authority here, it is entitled to attention, if it should be found on examination to contain a fair exposition of the common law on this point. The defendant, to meet the libellous matter, which was calling the plaintiff a "swindler and common informer," pleaded generally, "that he was one of a gang of swindlers and common informers, and had been guilty of deceiving and defrauding divers persons."

The objection to this plea, and which prevailed, was, that it was too general, as it did not set forth any particular act of swindling, nor whom the plaintiff had defrauded, nor in what manner.

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*Mr. Justice *Buller*, in giving his opinion, observes, "that it is not true that the *general character* of the plaintiff is put in issue, for the evidence to support the defendant's plea (or, which is the same thing, the libel) must be special; for where the whole defence arises from proof of particular facts, the general character is not in issue." On this I remark, that if general character could not be put in issue, even in the form of a plea, which gave full notice to the opposite party, much less should it be permitted in a way, which cannot fail to be attended with surprise and real inconvenience.

Though this case be not without its difficulties, the safest course will be, to exclude, on trials of this kind, all evidence of general reputation. It will only impose on those who choose to publish their animadversions on the crimes or failings of others, which occupy so great a portion of our public papers, the task of proving, by particular facts, the truth of what they assert. Nor is there any hardship in this. Those who sport with the feelings of others, under the professions of zeal for public good, on no other basis than that of common

fame, which is not always an infallible guide, (a) cannot complain, if courts require from them, on these, as on most other occasions, some better proof of their calumnies than general opinion. If every man who does not enjoy an unblemished reputation, or has the misfortune to be disesteemed by his neighbors, were fair game, in a country where the liberty of the press is so much perverted and abused, few, indeed, would escape.

There was some testimony offered, to show a provocation, which was also overruled; but as that has not been relied on, upon the motion for a new trial, I do not wish to be understood as giving any opinion on it. The *postea* should be delivered to the plaintiff.

TOMPKINS, J., declared himself of the same opinion.

SPENCER, J., having been concerned as counsel in the cause, gave no opinion.

KENT, Ch. J. The single question in this case is, whether the defendant, under the general issue, in an action of slander, *may, at the trial, give evidence as to the general character of the plaintiff in mitigation of damages.

The allegation, in the declaration, that the plaintiff is of good fame, is merely inducement to the action, and not traversable. (*Strachy's case*, *Styles*, 118.) It is a general rule, that matters which cannot be pleaded, may be given in evidence, in mitigation of damages; and when such matters are excluded from evidence, as the truth of the charge in an action of slander, one principal reason is, that they may be pleaded in bar, and the plaintiff be thereby apprized of the defence. (*Smith v. Richardson*, *Willes's Rep.* 20.)

It was upon this ground that Baron Price, at *nisi prius*, in the cause of *Dennis v. Pawling*, (12 *Vin.* 159. *pl.* 16.) ruled, that whatever tended to justify the words should not be given in evidence; but that whatever tended to show a provocation, or any transaction between the parties giving occasion for speaking the words, was proper, *because those matters could not be pleaded*.

So also, in the case of *Coot v. Berty*, (12 *Mod.* 232.) it was held, that a license by the husband to the wife to commit adultery, could not be pleaded in bar to an action of trespass by the husband, but that it might be given in evidence, in mitigation of damages. In these actions for criminal conversation with the plaintiff's wife, it is the settled practice, to admit not only the criminal conduct of the wife in general, and even particular acts, as her general behavior is put in issue, (*Elsam v. Fawcett*, 2 *Esp. Cases*, 562. *Buller's N. P.* 206.) but it is also the practice to inquire into the moral character and behavior of the husband himself, who is the party to the record.

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(a) *Tam ficti pravique tenax, quam nunc ia veri.*—Virgil.

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(See *Coot v. Berty*, 12 Mod. 232. *King v. Francis*, 3 Esp. Cases, 116. *Windham v. Wycomb*, 4 Esp. Cases, 16. *Bromley v. Wallace*, *ibid.* 237.)

As the general character of the plaintiff cannot be questioned by the plea, it would seem to result, necessarily, from the received principle, that it might be questioned in mitigation of damages. The character of the plaintiff must be considered as coming in, at least collaterally, upon the trial. It is always alleged as the inducement to the action, and the injury to it is the *gravamen* complained of. In assessing the *damages, the jury must take into consideration the general character, the standing and estimation of the plaintiff in society; for it will not be pretended, that every plaintiff is entitled to an equal sum, for the worth of character. The jury have, and must inevitably have, a very large and liberal discretion in apportioning the damages to the rank, condition and character of the plaintiff; and they must have evidence touching that condition and character, so as to have some guide to their discretion.

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If the plaintiff's character comes collaterally in question, in an action of slander, all that the books say in these cases is, that you cannot go into evidence of particular facts. There is not, I presume, a case to be met with, in which it is ruled, that you cannot examine into general character. Nor is there any general principle of law violated by such examination. Every man is supposed capable of supporting his general character, though no man is presumed to be capable of repelling a specific charge, without previous notice; and this is the true and rational distinction applicable to the case before us. (*Buller's N. P.* 296, 5.)

The case of *Dennis v. Pawling* is an authority in favor of the defendant's proposition. That was an action of slander, and Baron Price would not allow any *particular credit* to be given of the plaintiff, in evidence on the trial; but said, that if the defendant had a mind to examine to this, the question must be asked in *general*. So in cases of *crim. con.* the defendant has been permitted to question the general character and conduct of the plaintiff. It appears to me, therefore, that the admission of such testimony violates no rule of law; but is rather required by the general principle which admits in evidence matters relevant to the cause, and which could not be pleaded, and allows the general character of the party to be examined, when it comes in collaterally; such evidence is essential to guide the discretion of the jury, and its legality receives strong countenance from decisions bearing on the question. I am of opinion, accordingly, that the verdict ought to be set aside, with costs, to abide the event of the suit

*The court being thus equally divided, (a) the defendant took nothing by his motion.

Judgment for the plaintiff. (b)

(a) *Bridge v. Johnson*, 5 Wend. Rep. 342. *Etting v. Bank United States*, 11 Wheat. Rep. 59. 2 Wend. Rep. 218.

(b) In *Larned v. Buffinton*, (3 Tyng's Mass. Rep. 546.) it was held, that in slander the plaintiff may give in evidence his own rank and condition in life, previous to the action, and his general character, to aggravate the damages; and that the defendant may also avail himself of such evidence to mitigate the damages. In the case of *King v. Waring*, (5 Esp. N. P. Cas. 14.) which was an action for words, for giving a bad character of a servant, Lord Almonley permitted the plaintiff to give evidence of her antecedent good character;—general character being, in some respects, in issue.

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OVERSEERS
OF SHAWAN-
GUNK
V.
OVERSEERS
OF MAMAKAT-
ING.

The OVERSEERS of the POOR of the townd of SHAWAN- GUNK, against the OVERSEERS of the POOR of the TOWN of MAMAKATING.

FROM the return of the *certiorari*, directed to the Court of General Sessions in the county of *Ulster*, it appeared, that an order had been given by two justices of the peace, for the removal of *Sarah Hide*, a pauper, from the town of *Mamakating* to the town of *Shawangunk*. The order recited, that it was made on complaint of the *poor-masters* of the town of *Mamakating*; that the justices, "after examining the said *Sarah*, as well under oath as otherwise, could not discover that she had any legal settlement or place of residence in any part of the world whatever; that if suffered to remain she was likely to become chargeable to the town; and that the place she last came from was the town of *Shawangunk*. From this order the overseers of *Shawangunk* appealed to the General Sessions of the Peace, by whom it was confirmed.

Two justices may order the removal of a pauper, on information obtained from any source, or on suspicion. If the order states, that the pauper is likely to become chargeable; that the justices cannot discover the place of legal settlement, and that such pauper came last from the town of S., this is sufficient, without a more formal and express adjudication of the facts.

Fisk, in behalf of the plaintiffs in error, now moved to quash the order; 1. Because it was stated to have been made on the complaint of the *poor-masters* of the town of *Mamakating*, when no officers of that name are known in law, or authorized to make complaint; 2. Because it requires the overseers of the town of *Shawangunk* to receive the pauper, &c., without *adjudging* that she was legally settled in that town.

1. He contended, that the justices were not authorized to remove any person, unless upon complaint of the *overseers of the poor*, or from their own knowledge or belief that such a person is likely to become chargeable; and the grounds or reason for such removal ought to appear in the order. The complaint is a substantial part of the order, and it ought to be made by the persons designated by law for that purpose. *Here it was done, on the complaint of *poor-masters*, and unless the court will intend that they are the *overseers of the poor*,

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this exception must be fatal. (*Laws of N. Y.* 24 sess. c. 184 sect. 7. vol. 1. p. 566. *Rex v. Hareby*, 3 *Burns's Justice*, 566. 2 *Bott*, 636. 2 *Andrews*, 361.) "The removal is bad if it do not set forth any complaint made: for the complaint is the foundation of the justices' jurisdiction." In *Rex v. Inhabitants of Weston Rivers, &c.*, (2 *Salk.* 482.) it is said, "that a complaint from one not concerned is nothing."

2. The order merely *recites*, that the pauper had no place of legal settlement, and that she came last from the town of *Shawangunk*; but there is no express adjudication of the facts. The authorities on this point show, that there must be an adjudication, for want of which the courts have uniformly quashed the order of removal. (1 *Burrow's Set. Cases*, 39. 76. 594. 2 *Bott's Poor Laws*, 643. *Bury v. Arundel*, 645. *Rex v. Middleton*, 647. *Rex v. Weswood*. *Usculm v. Clythydon*, 648. *ibid.* *Trowbridge v. Weston*, 643. *ibid.*)

L. Elmendorf, contra. No particular form of order is prescribed. The justices are to make one according to the nature of the case. The present is well enough, and the first exception is of no force, as the act allows the justices to remove, on any information, or on their own knowledge.

As to the second exception, it may be said, that the order of removal may be made on two grounds, either on adjudication of a *legal settlement* of the pauper, or as a *vagrant*. This order expressly declares, that the justices do not know where *Sarah Hide* had her legal settlement, but directs her to be sent back to *Shawangunk*, from which she last came, which are the words of the act. There is, therefore, a substantial and sufficient adjudication of the facts.

Fisk, in reply. Whether it be an order of removal, or a *vagrant warrant*, yet it should contain an express adjudication. It must either adjudge the place of the pauper's legal settlement to be at *S.*, or that she is likely to become chargeable, and that she last came from such a town. The making of the order or warrant is a *judicial* act, and the adjudication should be set forth. It is the duty of the justices to hear, examine *and adjudge. The law will not allow them to remove upon light or trivial causes; their order should be clear, precise and definite. The adjudication is the substance and basis of the order. It cannot be presumed, but must be distinctly expressed. This is not a mere travelling order or warrant, as it is called, for it directs the overseers of *S.* to receive and provide for the pauper; such an order is directed to the constable of the next town, and so from him to the next. In either case, however, an adjudication is necessary.

Per Curiam. The justices may act on information obtained from any source, or on their own suspicion. The order of
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two justices states, that they do not discover that the *pauper* had any legal settlement in this state; and it expressly finds that *she came from Shawangunk*. This is a sufficient adjudication of the fact, to authorize them to send her back to that town.

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another

Motion denied.

M'CUMBER against GOODRICH and another.

THE return to the *certiorari* in this case, stated that the plaintiffs in the suit before the justice, declared against the present plaintiff in error, on a written agreement, dated the 18th February, 1804, by which he promised to frame and put up for them a house of certain dimensions, on or before the 1st day of June following. The plaintiffs below, on their part, engaged to furnish the materials on the spot where the frame was to be erected, and in consideration of the performance of the promise of the defendant below, they stipulated to pay to him the sum of 70 dollars, in wheat and cattle, on the 1st day of November ensuing. There was an averment that the defendant did not put up the frame, &c.

In an action before a justice, under the ten pound act, every demand arising on contract may be set off.

The defendant below requested an adjournment of the cause, which was granted by the justice, and on the day fixed the parties appeared, when the *plaintiffs* below demanded a trial by jury, and a *venire* was issued. The jury were summoned, empanelled and sworn, on the same day, and sat together to *hear the allegations and proofs of the parties. The defendant then *pleaded*, that the plaintiffs ought not to have or maintain their action against him, because he had before that time commenced an action against the plaintiffs before another justice, in the investigation of which the same question then before the jury, had been made before the other justice, and that the damages claimed by the plaintiffs ought to have been set off by them in the former suit. The plaintiffs *replied*, that their demand was not exhibited before the other justice, and that, being for uncertain damages, it could not have been set off in that action. The justice, after hearing the parties and their evidence, decided, that the plaintiffs ought not to be barred by *means of the premises*, on which further evidence was introduced. The same *pleas* were again stated and argued before the jury, who found a verdict for the plaintiffs, for the damages demanded.

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Simonds, for the plaintiff in error, contended, that the judgment below ought to be reversed, for the following reasons; 1. That the declaration does not contain an averment of the performance of the condition precedent; 2. That the justice adjourned the cause before issue was joined; 3. That the jus-

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dice issued a *venire* before any issue was joined; 4. That the justice overruled the plea of a former trial and recovery; and, 5. That he, afterwards, suffered the same pleas to go to the jury.

To show the necessity of averring the performance of a precedent condition, he cited *Doug.* 684. *Wm. Blacks. Rep.* 630 *Espinasse's Digest*, 304.

Kirkland, contra.

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KENT, Ch. J., delivered the opinion of the court. Several objections were raised to the validity of the proceedings below—but it will be sufficient to notice one which goes to the *merits* of the case. The defendant below pleaded a former suit by him against the plaintiffs, in bar, and they replied, that their demand being for uncertain damages, could not be set off in the former suit, and the justice overruled the plea. The existence of the former suit was not put in issue, but admitted by the replication, which also admitted that the demand for which the present suit was brought, had not been pleaded, nor set off in the former suit. The simple point, therefore, is, whether it ought not to have been set off. The ninth section of the ten pound act states, that the defendant may plead, or set off his account or demand against the plaintiff, and that if he neglects or refuses so to do, he shall forever thereafter be precluded from any action to recover the same. The words here are very broad. It is his account or demand that is to be set off. In *England*, unliquidated damages cannot be set off, for the set-off statutes speak only of *mutual debts*. Our statute receives a similar construction, for it applies only to persons *dealing together and indebted* to each other. But I think the act in question requires a more extensive construction, and that the word *demand* here must apply, at least, to all matters arising upon contract. The act is very imperative, and intended to prevent cross suits, and a course of petty and vexatious litigation, in respect to demands within the jurisdiction of a justice. It is not necessary, at present, to say whether the word *demand* in the act, will reach to every matter within the cognizance of a justice, nor do I mean to be understood to that extent. But as to demands arising upon contract, I am of opinion, they ought to be pleaded or set off, and, consequently, that the justice determined erroneously in this case. The return states, that the same pleas were afterwards introduced and argued before the jury, but we are here to understand that the pleadings still included the same admissions of the parties, and that the facts of the existence of the former suit, and of the omission to set off, were not controverted. The jury, therefore, by their verdict, confirmed the erroneous decision

of the justice; and for this cause, I think the judgment below ought to be reversed. (a)

Judgment reversed.

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(a) By the 6th sect. of the revised act (31 *sess.* c. 204.) it is provided, that the defendant is not required "to set off any damages arising or accruing from any trespass done, &c., or any other demand, except such only as may arise on contract, either express or implied by law; but this exception is not to exclude any written evidence of debt, with or without seal."

*RICHARDSON *against* BACKUS.

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THIS was an action of *slander*. It appeared from the affidavit, which was read, that an interlocutory judgment had been obtained for want of a plea, and a writ of inquiry awarded, on which 600 dollars damages were assessed by the jury. The defendant had demurred to the declaration; and in *August* term, the demurrer was overruled, but the defendant was allowed to withdraw his demurrer, and plead, on payment of the costs. The defendant, not having, in the opinion of his counsel, sufficient evidence to support a plea of justification, suffered a judgment by default. After notice of executing the writ of inquiry, and before the jury had actually assessed the damages, the defendant discovered material evidence, before unknown to him, and which he was advised would fully justify the speaking the words charged in the declaration. The affidavit further stated, that the evidence since discovered would prove the truth of the words spoken; but it did not mention the names of the witnesses, nor the particulars of what he expected to be able to prove by them.

On an application to set aside the writ of inquiry and subsequent proceedings in an action of slander, on the ground, that the defendant had since discovered new evidence, which would amount to a justification of the words spoken, the affidavit ought to state the names of the witnesses, and what the party expects to prove by them. A mistake in a writ of inquiry of the formal description of the court before which it is returned, is cured by the statute of *jeofails*.

Russel, for the defendant, moved to set aside the default, writ of inquiry, &c. He contended, that the proceedings ought to be set aside on the ground of irregularity; 1. Because no rule had been entered, since that of *August* term, which did not award a writ of inquiry; 2. That the writ of inquiry does not follow the words of the act relative to process in the Supreme Court, as it stated the proceedings to be "before our justices of the Supreme Court," &c., and was made returnable "to our said court, before the justices aforesaid."

Whenever a particular form of words in any process are prescribed by statute, those words must be strictly followed. In the case of *Drake v. Miller*, (*Cole. Cas.* 85.) process containing such words was declared void. Even if the court should be of opinion that there was no irregularity, yet, as new and material evidence has since been discovered (2 *Wm. Black.* 955.) by the defendant, and which he has had no opportunity to produce, he ought to be allowed to come in, and plead *on

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such terms as the court may impose. The extraordinary and very heavy damages assessed in this cause, was an additional reason for the interposition of the court.

Z. R. Shepherd, contra. The practice of the court does not render it necessary to enter a rule for awarding a writ of inquiry. It is a judicial writ, founded on record. The statute expressly declares, that it shall be awarded. It differs from the case of an assessment of damages by the clerk of the court, which is a special power given by the act, and an order of the court for that purpose becomes requisite. Admitting that the writ of inquiry had irregularly issued, that irregularity was waived by the party's attendance at the time of execution, and he cannot now take advantage of it.

The words in the act relative to writs, refer only to first process, and not to writs of inquiry; but even if it were informal, that informality is cured by the statute of *jeofails*. The court have unquestionably a right to allow the party to come in and plead; but, under all the circumstances of the case, considering his wilful negligence, it would be unreasonable. The affidavit does not state the nature of the evidence, which has been since discovered; it does not disclose the names of the witnesses, nor what they can testify. Instead of stating the opinion of counsel as to its materiality, the whole evidence ought to have been laid before the court, to enable them to judge whether it is material, or not.

Per Curiam. The words "our justices," &c. refer to the justices of this court, who are named in the preceding part of the writ; and we are inclined to think the writ sufficient, in point of form. At any rate, we are all of opinion, that the defect is cured by the statute of *jeofails*.

As to the other point, we think that the affidavit of the defendant ought to have disclosed the names of his newly discovered witnesses, as well as what he expected to prove by them. This would serve for a check against the abuse of general affidavits, after a trial. Let the proceedings, therefore, be stayed until the first day of the next term, that the defendant may have an opportunity, if he thinks proper, to amend his affidavit.

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*LIVINGSTON *against* CHEETHAM.

Where a public officer sues for a libel in relation to a trust held *ex officio*,

WOODWORTH, Attorney General, for the plaintiff, moved for a *struck jury* in this cause, on an affidavit stating, that the plaintiff, at the time of the publication of the *libel* for

which this action is brought, was, and now is, recorder of the city of *New-York*, and *ex officio*, a director of the *Manhattan Company*; that the libellous publications in question were concerning his conduct, in relation to the interests and affairs of the said company; and that the same were false and unfounded.

Riker, contra.

Per Curiam. In the case of *Foot*, (b) who was district attorney, and brought an action for a libel, a struck jury was allowed. The present application is within the reason of that case. The plaintiff is an important officer, and libelled as to his trust in respect to the *Manhattan Company*, and, in consideration of his public station and character, we think the rule ought to be granted.

Rule granted. (c)

(b) 1 *Caines*, 498. *Spencer v. Sampson*, and *Foot v. Croswell*. In the latter case, on being informed that his affidavit was defective, the plaintiff withdrew his motion, and at a subsequent term, on another affidavit, the court allowed a struck jury.

(c) See *Van Vechten v. Hopkins*, (2 *Johns. Rep.* 373.) and *Thomas v. Rumsey*, (4 *Johns. Rep.* 483.)

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a struck jury
is allowed. (a)

(a) *Poucher v. Livingston*, 3
Wend. Rep. 296

HARDENBERGH against THOMPSON.

L. ELMENDORF moved to set aside the judgment and execution in this cause, for irregularity. The affidavit stated, that, in *October*, 1804, *Thompson* obtained a judgment against *Hardenbergh*, before one of the justices of the peace, in the county of *Ulster*; that *Hardenbergh* afterwards removed the cause into this court, by *certiorari*, on which the judgment below had been reversed; that the present defendant had never received any notice of the *certiorari*, nor of the subsequent proceedings, until the sheriff informed him that he had an execution against him, issued out of this court, at the suit of the plaintiff in error.

Where no attorney is employed by a defendant in error on *certiorari*, the notice of the rule to join in error, must be served on the defendant personally, and not by putting it up in the clerk's office.

**C. Elmendorf* and *Sudam*, for the plaintiff in error, opposed the motion, on an affidavit, stating that after the return to the *certiorari* and an assignment of errors had been filed, a rule for the defendant to join in error was entered, and a notice thereof put up in the clerk's office, as the plaintiff had received no notice that the defendant had employed an attorney; and that after the expiration of the rule, a default was entered and a judgment of reversal thereon.

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Per Curiam. The rule to join in error ought to have been personally served on the defendant. It was so decided in *October* term, 1801, in error, on *certiorari*, where a motion for

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judgment of reversal on default, for not joining in error, though not opposed, was denied, it appearing, that no attorney had been employed by the defendant in error, and that the notice had been put up in the clerk's office.

Rule granted.

BALLOU, Assignee of the Sheriff, &c. against HULBERT and another.

Where one of two defendants is taken on a *capias ad respondendum*, and judgment entered and an execution issued against both, such execution will not be set aside for irregularity, if it appears that only the defendant originally arrested, is taken in execution.

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SIMONDS, in behalf of the defendants, moved to set aside the *capias ad satisfaciendum* in this cause, on the ground of irregularity. From the affidavits produced, it appeared that *A. Hulbert*, one of the defendants only, had been taken on the *capias ad respondendum*, issued against both at the suit of the plaintiff. Judgment having been obtained in the suit, the plaintiff took out execution against both defendants, who were taken in execution and now remain in prison.

Gold, contra, produced the *ca. sa.* on which the sheriff had endorsed, that *A. Hulbert, one of the defendants only, had been taken*. He contended, that by the words of the statute, (a) an execution might be issued against both the defendants, *though the one only who had been arrested on the *mesne* process, could be taken in execution, and that a plaintiff might endorse a direction on the *ca. sa.* to that effect. Though the general practice may be to issue a special execution in such cases, yet there was no necessity of inserting such special clause, as the directions of the act would be complied with, if such of the joint defendants as were taken and brought into court, on the *mesne* process, were alone taken in execution. The words, "shall not issue or execute," used in the act, when taken in connection with what followed, must be understood to mean no more than that the execution should not be executed against such defendants as were not brought into court, but the execution might be general, and against all, according to the judgment.

The court refused to set aside the execution, but as it appeared from the affidavits, that *J. Hulbert* was illegally detained in custody, they ordered him to be discharged.

Rule refused, with costs.

(a) *Revised Laws*, vol. 1, sess. 24, c. 99, s. 13. The creditor or creditors of joint debtors may issue a process against them in the manner now in use, and in case any of such joint debtors be taken and brought into court, he or they so taken and brought into court, shall answer to the plaintiff, and in case judgment shall pass for the plaintiff, he shall have his judgment and execution against such of them as were brought into court, and against the other joint debtors named in the process, in the same manner as if they had all been taken and brought into court by virtue of such process; but it shall not be lawful to issue or execute any such execution against the body or against any lands or goods the sole property of any person not brought into court.

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THE court determined, that when the argument of a case is opened, the counsel shall furnish the *opposite side* with the points relied upon by the party, in support of the motion.

Practice on
opening argu-
ments.

*THE PEOPLE, *at the relation of* TREMPER, *against* THE JUDGES and SUPERVISORS of the County of ULSTER.

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AT the last term, an alternative *mandamus* had issued, directed to the defendants, and no return having been made, *Emott* now read an affidavit, stating that it had been served by delivering a copy thereof to each of the defendants, and at the same time showing the original, and moved that a peremptory *mandamus* should issue.

Where an *alternative mandamus* has been duly and regularly served, the court, on affidavit of such service, will issue a peremptory *mandamus* without compelling a return to the first writ. (a)

Gardinier and *Van Ness*, contra, contended that a peremptory *mandamus* could not issue until a return was made to the first writ. The rule should be for a return to the first *mandamus*; as in other cases, where a writ is not returned, a rule is obtained, requiring the person to whom it was directed, to return it in a certain time, or that an attachment issue.

(a) *The People v. The Judges of Westchester*, 4 Cow. Rep. 78.

Emott and *Harison*, in reply. The alternative *mandamus* is like a rule to show cause; and as copies have been duly served on all the parties, and no cause shown, it is regular to issue a peremptory writ. A *mandamus* is not like ordinary process, nor governed by the same rules. It is a high prerogative writ.

Per Curiam. It is not requisite that we should go through the process and delay of rules and attachments, in order to compel a return to the first *mandamus*. The *alternative* in it, was intended for the benefit and convenience of defendants. As the first writ has been regularly served, we may, at our discretion, order a peremptory *mandamus*; but as the defendants may not have had a sufficient time to meet together and make their return, we are disposed to allow them a further day for that purpose.

The counsel, thereupon, agreed on the 15th day of *April*; and the court ordered, that if the return was not made on that day, the *relator* might sue out a peremptory *mandamus*.

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the purpose of paying, in part, the contents of the said note and that in case the said *O. D.* would purchase the said note of the said *Barrett*, he, the said *Ward*, would thereupon immediately pay the sum of 200 dollars to the said *O. D.*, in part payment of the said note, and would pay the remainder in a short time thereafter. The indictment further charged, that *Barrett*, according to the said conspiracy, assigned the said note in the manner above stated; and that *Barrett*, in pursuance of the said conspiracy, under false pretences, did wickedly and fraudulently obtain from the said *O. D.* one horse of the value of 30 dollars, a wagon of the value of 30 dollars, &c. of the goods and chattels of the said *O. D.*, whereas, in truth, the said *Medad* was not solvent and able to pay, &c., and that the defendants, at the time, well knew the same; and whereas, in truth, the said *Ward* was not the maker of the said note, nor liable to pay the same, as was falsely pretended, &c., and that the defendants well knew the same, &c.

The question as to the validity of the plea of *autrefois acquit* was brought before the court on a case made.

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*The case was argued in *August term* last, by *Russell*, attorney for the *People*, and *Crary*, for the defendants.

The points contended for by *Russell*, were, 1. That the offence charged in the first indictment did not appear to be the same as the one laid in the second.

2. That the former indictment was erroneous, and therefore no bar to a second prosecution.

The judges, not being unanimous, now delivered their opinions *seriatim*.

TOMPKINS, J. In discussing the points in this cause, I shall take for granted, what was not controverted upon the argument, that the proceedings of the first trial of the defendants amounted to a general verdict of acquittal.

The principal grounds upon which the first point is attempted to be supported, are, that in the first indictment it is stated, that the defendants conspired to defraud one *Darren* of his money, goods and chattels, whereas, in the second, they are charged with conspiring to defraud him of his goods and chattels only; that the date of an endorsement of the note, mentioned in both indictments, is mentioned in the former to have been on a particular day, and in the latter, on a different day. These variances between the record of acquittal and the indictment to which it is pleaded, are wholly immaterial. The same evidence would have supported either indictment. Testimony of defrauding *Darren* of his money, would have been sufficient to support the charge for defrauding him of his goods and chattels. And the endorsement of the note, for aught that appears, being in blank, according to the customary mode of negotiating promissory notes, it was discretionary with the prosecutor, to allege the endorsement to have been made at

any day after the date of the note, of which the defendants could not take any advantage. If the nature of the crime be substantially the same, a variance between the indictments, in other respects, may be helped by averments in the plea. The cases in which variances have been thus helped, as mentioned in *Hawkins* (c. 25. § 3.) and in *Pulton, de pace regis*, (title *Indictment*, § 39 and 40.) are much stronger than *the present. It is there laid down, that the party indicted may plead the former acquittal, and, notwithstanding a variance, may, by averments, show the truth of the case, and be discharged. In this case, the conspirators, the facts of conspiracy, the security in relation to which the fraud is charged, and the person intended to be defrauded, are the same, and in every substantial matter, the two indictments coincide. The first point, therefore, is untenable.

The second point is one of great importance. The general principle established in the history and reports of the pleas of the crown, is, that no one shall be twice put in jeopardy for the same offence.

The doctrine here contended for originated with *Vaux's* case, (4 Co. 44.) in which it was decided, that unless the party has been lawfully acquitted, upon a sufficient indictment for the same offence, he cannot have the benefit of the plea of *autrefois acquit*. By a lawful acquittal, must be understood an acquittal by a general verdict. If, therefore, the accused escape a trial by the entry of a *nolle prosequi*, by quashing the indictment, upon an issue of *demurrer*, or in *abatement*, he is not lawfully acquitted, and cannot in those, and the like cases, evade a trial by the country, for the same offence. The same observation applies to the cases of withdrawing a juror, *ex necessitate*.

It may, perhaps, be questioned, whether, by an insufficient indictment, in the authorities relating to this subject, is not meant, one which states facts and circumstances that do not amount to an offence, or which wants the legal and technical words to denote the crime. Thus, in *Pulton* (tit. *Indictment*, § 42.) it is laid down, that the plea of *autrefois acquit*, is not a good plea to an indictment for felony, unless the record vouched does contain *sufficient matter of felony*.

In 2 *Hale* (247.) it is also said, that *autrefois acquit* was not a good plea in the case there mentioned, because the first indictment was *insufficient*, for it contained *no matter of felony*. But, on examination, the cases cited do not appear to me to apply to the present case, because *the defendants availed themselves of the defects in the indictment, or finding. In *Vaux's* case there was not a general verdict of not guilty, on the first trial; but his counsel took advantage of an insufficient finding in the special verdict. In *Cogan's* case,† where there was a verdict of not guilty upon the first indictment, the plea in bar to the second did not prevail, because the offences were

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† 2 Leach, 503

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not the same, which is the reason assigned by the court for their decision.

The defendants in this cause did not avail themselves of any defects in the first indictment, but were acquitted, because the public prosecutor had not sufficient proof at the time to establish the charge against them. To allow him, now, by pointing out defects in his own pleading, to place the defendants in jeopardy a second time, would contravene a salutary maxim, that no one shall take advantage of his own wrong. The defects, if any, in the former indictment, are to be attributed to the district attorney; and if he can take advantage of them, when will the peril of the defendants cease? A second, third or fourth acquittal will not secure them, if the ingenuity of the prosecutor discover defects in the antecedent indictments. I am inclined to think the presumption, that the court will not render judgment upon a conviction, if the indictment be defective, ought not to, have much weight at the present day. As offenders appear by counsel, or have counsel assigned them by the court in almost all cases, unless advantage is taken by them or their counsel, the court will seldom, of its own motion, seek for defects in an indictment where there is a conviction, if an offence be substantially stated. Since, therefore, the matter in the first indictment is substantially the same for which they are arraigned the second time; since the defendants took no advantage of any defect in the indictment on their first trial, and have been acquitted by the proceedings which this court considered as equivalent to a general verdict of not guilty, I think their plea constitutes a good bar to the second indictment, and that they ought, therefore, to be discharged.

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*SPENCER, J. It is contended that, owing to the imperfections in the first indictment, the present plea is not a bar. The case of *William Vaux* (4 Term Rep. 44.) is a leading case. *Vaux* had been indicted for poisoning *Nicholas Ridley*; a special verdict was found, and judgment of acquittal was given. He was indicted again for the same murder, and pleaded the former acquittal. On this plea, it was resolved, that when the offender is discharged on an insufficient indictment, there, the law not having had its end, nor the life of the party ever in danger, he may be again indicted, and tried; under this opinion, *Vaux* was tried a second time, convicted and executed. This case is sanctioned by *Hale* and *Hawkins*, (2 *Hale*, 248. 4 *Hawk*. 317.) the latter of whom says, "he takes it to be settled, that wherever the indictment is so erroneous, for want of substance in setting out the crime, that no good judgment could be given on it, against the defendant, an acquittal is no bar to a subsequent indictment, because, in judgment of law, the defendant never was in danger."

The defendants' counsel has obviated all the exceptions taken

to the first indictment, but one. There appears to be no *venue*, either expressly, or by implication, as to the fraudulent representations made by *Barrett* to *Darren*, that *Gun*, the maker of the note imposed on *Darren*, was in solvent circumstances. This representation is the very *gist* of the indictment; and had the defendants been convicted on it, I should have held the judgment liable to be arrested; for it is a fundamental principle in criminal law, that every material fact must be clearly and fully set out, so that nothing can be taken by indictment. It does not, then, appear that the essence of the offence was committed in the county of *Washington*, or even within the state; for this reason I conceive the first indictment radically defective, and, consequently, that the defendants are bound to plead over to the second.

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THOMPSON, J. From the case presented to the court, we are to consider the defendants as acquitted, at a former trial, upon an indictment for the same offence for which they now stand charged; and the two questions presented for decision, are, 1. Whether the former indictment was materially *defective; if so, then, 2. Whether an acquittal thereon is a bar to the present prosecution.

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I think the first indictment defective for want of a *venue* in that part which charges *Barrett* with making a fraudulent pretence, pursuant to the conspiracy previously entered into between him and *Ward*. It is well settled that an indictment ought to contain a proper *venue*, for the purpose of showing where the offence was committed. (2 *Hawk.* c. 25. s. 83. 5 *Term Rep.* 162.) Every act material to constitute the offence charged, must be alleged to have been done at some place. The fraudulent pretence practised by *Barrett* was a material allegation, and required a *venue* as much as any part of the indictment.

Will an acquittal, then, on such a defective indictment, discharge the party accused from any further prosecution for the same offence? I think not. It appears to me, that the law on this subject has been long since settled, and were I disposed to question the propriety of the principle, I should not feel myself at liberty to overturn what I have considered an established doctrine. The rule, as laid down by Serjeant *Hawkins*, in his valuable *Treatise on Criminal Law*, (book 2. c. 25. s. 8.) and which is supported by the authorities there cited, is plain and explicit. He says, "I take it to be settled at this day, that wherever the indictment or appeal whereon a man is acquitted is so far erroneous, either for want of substance in setting out the crime, or of authority in the judge before whom it was taken, that no good judgment could have been given thereon against the defendant, the acquittal can be no bar of a subsequent indictment or appeal." The reason assigned for it is, "because, in judgment of law, the defendant was never

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a danger of his life from the first. For the law will presume, *prima facie*, that the judges would not have given a judgment which would have been liable to have been reversed." Without further examination, therefore, I am satisfied that the plea of *autrefois acquit* is no bar to the present prosecution.

LIVINGSTON, J. The plea of *autrefois acquit* is thought not to apply here; because, the first indictment is erroneous, and the second not for the same offence.

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*If an opinion had been pronounced, at the instance of the party, on the insufficiency of the first bill, either on a special verdict, or after a general finding, on a motion in arrest of judgment, this case would bear some resemblance to, and might be governed by, that of *Vaux*, (4 Co. 44.) which has given rise to all the *dicta* on this subject. *Vaux* was indicted a second time for murder. He pleaded a former acquittal, but it appearing that on the first trial there had been a special verdict only, upon which judgment was rendered in his favor, for an insufficiency in the indictment, it was held that the plea was bad, and *Vaux* was again tried, convicted and hanged. The court, in giving its opinion, is made very gravely to say, that the prisoner's life, although tried for murder, had *never* been in jeopardy, because the first indictment was imperfect; and yet not one counsel in a hundred would have had discernment enough to point out the defect, which, for that time, had saved him from the gallows.

Without denying the law, though not at all satisfied with the reason, on which it is founded, it is totally inapplicable to the question before us. In *Vaux's* case, an acquittal had been pronounced by the court, at the prisoner's instance, *before* a second bill was presented, and had thus become matter of record, and formed a part of his plea. Even thus far, a court should very reluctantly go; for to tell a man who had been within an ace of being executed, that his life had been in no danger at all, savors a little of refinement, and was sporting, to say the least, with the feelings of the prisoner.

But, without disputing a decision which, notwithstanding the sayings of several learned and great men to which it has given rise, does not appear ever to have been practised on in *England*, it will be sufficient to show a very great and essential difference between the case of these defendants and that of *Vaux*. The jury had *not acquitted*, nor given *any opinion* on his guilt, but had referred the whole matter to the court. *Barrett* and *Ward*, on the contrary, are found not guilty by the jury themselves; for the discharge, on the motion in arrest of judgment, is considered by this case as *a* general verdict of acquittal. *Vaux* laid hold of a defect in the indictment. These defendants have availed themselves of no such imperfection, if any there were, nor has any judgment to that effect been pronounced. This case, in short, presents the

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novel and unheard of spectacle, of a public officer, whose business it was to frame a correct bill, openly alleging his own inaccuracy, or neglect, as a reason for a second trial, when it is not pretended that the merits were not fairly in issue on the first. That a party shall be deprived of the benefit of an acquittal by a jury, on a suggestion of this kind, coming too from the officer who drew the indictment, seems not to comport with that universal and humane principle of criminal law, "that no man shall be brought into danger more than once for the same offence." It is very like permitting a party to take advantage of his own wrong. If this practice be tolerated, when are trials of the accused to end? If a conviction take place, whether an indictment be good, or otherwise, it is ten to one that judgment passes; for if he read the bill, it is not probable he will have penetration enough to discern its defects. His counsel, if any be assigned to him, will be content with hearing the substance of the charge, without looking further, and the court will hardly, of its own accord, think it a duty to examine the indictment to detect errors in it. Many hundreds, perhaps, are now in the state prison on erroneous indictments, who, however, have been fairly tried on the merits. But reverse the case, and suppose an acquittal to take place, the prosecutor, if he be dissatisfied, and bent on conviction, has nothing to do but to tell the court that his own indictment was good for nothing; that it has no *venue*, or is deficient in other particulars, and that, therefore, he has a right to a second chance of convicting the prisoner, and so on, *toties quoties*.

Of the alleged imperfection in this indictment we should never have heard, if the verdict had been the other way. I am glad there is not one precedent which compels me to listen to this application; a power to try *ad infinitum*, as often as some latent defect be discovered in an indictment, may not only be abused in the hands of an attorney general, *but is unsafe in those of a court. If judges have the power of putting a party on his defence a second, and a third time, because of imperfections of this kind, there is no man who may not, if the court please, be finally convicted, or cruelly harassed by such a course of proceeding. It is a sufficient argument against the assumption of such power, that it is subversive of the trial by jury, and that it is liable, in seasons of political conflicts, to great abuse. Judges are but men, and not more secure than others against improper influence.

The objection, that the second indictment is not for the same offence, is not founded on fact. Both prosecutions are for the same conspiracy. This was conceded on the argument, and the indictments correspond in every essential point. It would, therefore, be little better than a mockery to permit trials to proceed, as often as by a slight change of phraseology, or ingenuity in a district attorney, the last indictment may be

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made to vary from the preceding. In my opinion, the defendants are entitled to their discharge.

KENT, Ch. J. The first question that arises upon this case is, whether the indictment of 1803 was erroneous, so that a good judgment could not have been given against the defendants, if they had been convicted. The indictment does not contain a *venue* in that part of it, which avers that the defendant Barrett made a *fraudulent pretence*, in pursuance of the conspiracy, previously, and at another day, formed. This is a material allegation, and it required a *venue*, as much at least, as any part of the indictment; for the act done in pursuance of the conspiracy, was the *gist* of the charge. This omission, as it appears to me, was an error, for which the judgment to have been given thereon, might have been arrested or reversed. (2 Hawk. c. 25. § 83. and *The King v. Matthews*, 5 Term Rep. 162.)

It is very questionable, also, whether the indictment be not bad in another respect. The *specific* pretences by which the fraud was to be effected, are not laid as having been agreed upon at the time of the conspiracy. (a) The conspiracy is laid generally, that they conspired to cheat, by the transfer of a note; but the false tokens by which that was effected, *appear to have been the *separate* and voluntary acts of each defendant by himself, and may not have been previously known to each other. The defendants are only answerable upon such a charge, for acts to the doing of which they had *jointly* conspired. Unless the acts were done in pursuance of a joint agreement, they became the *distinct acts* of each individual, though they may have conducted to effect a *joint object*. (b) It is not necessary, however, to give any strong or decided opinion upon this point, since the want of a *venue* appears to be an objection more clearly fatal.

The next question is, whether the defendants can lawfully plead an *acquittal* upon an erroneous indictment, in bar of a new prosecution for the same offence.

The general rule of law, as laid down by Serjeant *Hawkins*, (vol. 2. c. 35. s. 8.) and which he takes to be settled at this day, is this, "that wherever the indictment, whereon a man is acquitted, is so far erroneous, (either for want of substance in setting out the crime, or of authority in the judge, before whom it was taken,) that no good judgment could have been given upon it against the defendant, the acquittal can be no bar of a subsequent indictment, because, in judgment of law, the defendant was never in danger of his life from the first; for the law will presume, *prima facie*, that the judges would not have given a judgment which would have been liable to have been reversed." *Vaux's case* (4 Co. 44.) is generally re-

(a) In *Rex v. Platow*, (1 Camp. N. P. Cases, 494.) Lord *Ellenborough* held, that the false pretences must be distinctly set out, and must be proved as laid.

(b) See 1 *East's Pleas of the Crown*, 97, 98.

ferred to as the leading authority in support of this position. He was indicted for murder, for poisoning one *Ridley*, and pleaded not guilty; he was tried, and the jury gave a *special verdict*, and the court gave judgment thereon, that the facts, as set forth in the verdict, did not support the indictment, and the defendant was discharged. He was afterwards indicted again, for the same crime. The indictment being removed into the K. B., he pleaded the former acquittal in bar, and it was resolved by the court that the first indictment was insufficient, and the plea of *autrefois acquit* was no bar; for that plea meant only a *lawful acquittal*, or conviction; that if the conviction or acquittal was not lawful, his life was never in jeopardy; and because the indictment *was insufficient, he was not *legitimo modo acquietatus*. A case in the *Year Books* of 19 *Edw. IV.* (1 *Bulst.* 142.) was referred to in support of the decision, and *Vaux* was accordingly tried again, convicted and executed. This case fully supports the doctrine in *Hawkins*; and if good law, (of which no doubt has ever been entertained in the books,) it goes completely to overrule the plea in the present case. An acquittal by special verdict, and judgment thereon, is equal to an acquittal by a general verdict of not guilty, and certainly as operative as the acquittal before us. This case of *Vaux* is cited and recognized as good law in *Sir Mathew Hale's Pleas of the Crown*, (vol. 2. p. 248.) and a distinction is there taken between an erroneous judgment, arising from error in the court, upon a verdict which is held to be conclusive upon the *king*, till reversed, and a judgment of acquittal, in a case where the indictment itself, which is the foundation of the action, is bad; that in the latter case it shall be presumed, that the judgment of acquittal was given upon the defect in the *indictment*, and not upon the *verdict*, for the judgment is the same in both cases, and the judges are bound to look into the indictment. *Brooke*, in his *Abridgment*, (*Corone*, 35.) cites 9 *Hen. V.* 2. and says, it was agreed, that if a man be arraigned of felony and acquitted without original, he shall be again arraigned at the suit of the *king*; but where he is arraigned upon good original, as good appeal, or indictment, and acquitted, and the *mesme* process or return be ill, there he shall not be again arraigned.

I am satisfied, therefore, that the law is not now to be questioned, that if the indictment be defective, so that no good judgment could have been given upon it, an acquittal upon such indictment is no bar. (a)

The present plea must be overruled, and the defendants plead *de novo*.

Plea overruled.

(a) See 2 *East's P. C.* 522. c. 15. s. 29. *BULLER, J.*, at the *Old Bailey*, in *June*, 1796, laid down the principle to be, that unless the first indictment were such as the prisoner might have been convicted upon, by proof of the facts contained in the second indictment, the acquittal on the first indictment was no bar to the second. See also *King v. Emden*, (9 *East*, 437.) *People v. Olcott*, (2 *Johns. Cas.* 301.) *State v. Woodruff*, (2 *Day's Cases in Error*, 504.)

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Or an indictment for a nuisance, in keeping 50 barrels of gunpowder in a certain house near the dwelling-houses of divers good citizens, and near a certain public street, &c. it was held that the fact so charged does not amount to a nuisance. *Aliter*, if it had been alleged to have been negligently and improvidently kept.

THE defendants were indicted in *Kings* county, for keeping a nuisance. The indictment contained two counts. The first states, that the defendant, on the 10th day of *April*, 1804, and on divers other days and times, between that day and the day of taking the inquisition with force and arms, at *Brooklyn, &c.*, near the dwelling-houses of divers good citizens of the state, and also, near a certain public street, there did keep, and still keep and maintain, a certain house, and then and there, on, &c., unlawfully and injuriously, in the said house, did receive and keep, and still keep, 50 barrels of GUNPOWDER, whereby divers good citizens, there residing and passing, are in great danger, to the damage and common nuisance of all the good citizens, there residing, and passing and repassing the said street, &c.

The second count charged, that the defendants, on the 10th of *August*, in the year aforesaid, at, &c., to wit, in the common and public street, there called the main street, leading from a place there, called *Brooklyn Ferry* to the *Dutch church*, in the said town, being the people's common highway, from time immemorial, used, with carts and carriages, to go, return, pass and repass, &c., unlawfully and injuriously did put and place ten casks of gunpowder on a certain cart, the wheels of which were bound with iron, and the said cart did cause to be drawn in, by, through, and along the said street, over gravel and stones there being, by reason whereof the good citizens of this state, at, &c., on, &c., could not go, and return, pass and repass along the said street, without great danger, to the great damage and common nuisance of all persons passing, &c., through the said street, &c.

Upon this indictment, the defendants were tried and found guilty. The proceedings having been removed into this court, by *certiorari*, the defendants moved in arrest of judgment, on the ground, that the acts charged in the indictment do not amount to a nuisance.

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The motion was argued at the last term, by *Jones*, for the *defendants, and *Riker*, attorney of the district, in behalf of the *People*.

Cur. adv. vult.

The judges, not being unanimous, now delivered their opinions *seriatim*.

SPENCER, J. On the part of the defendants, it has been contended,

1. That to keep powder, under the circumstances stated in the indictment, is not a nuisance.

2. That the offence consists only in its being carelessly kept.

It is a settled principle in the criminal law, that nothing can be intended in support of an indictment; and *é converso*, nothing can be intended, after a trial and conviction, against the facts charged, or that they exist otherwise than they are stated. I dismiss, therefore, all that was said relative to the great security of the house in which this powder was kept, as well as every circumstance tending to show that it was carelessly kept, and proceed solely on the facts, that the defendants kept, in an ordinary house, 50 barrels of gunpowder, near the dwelling-houses of divers citizens, and near a certain public street, in *Brooklyn*, to the common nuisance of the good people there, if, in point of law, powder thus kept, can be a common nuisance.

"Common nuisances," says Judge *Blackstone*, in his *Commentaries*, (vol. 4. p. 167.) "are a species of offences against the public order and economical regimen of the state; being either the doing of a thing to the annoyance of all the king's subjects, or the neglecting to do a thing which the common good requires." Under this head, he refers the making, keeping, or carrying of too large a quantity of *gunpowder*, at one time, or in one place, or vehicle, which he says, "though not declared a common nuisance, is prohibited by the 12th *Geo.* III. c. 61. under heavy penalties and forfeitures." He gives no direct opinion, whether the keeping too large a quantity of it in one place was a nuisance or not, at common law. When he says, "though not declared a common nuisance," I understand him to refer to this statute which has not, *eo nomine*, declared it a nuisance, and not as speaking in reference to the common law. If, however, he infers, as the defendants' *counsel have done, that it was not a common law offence, because the legislature have prohibited it under superadded penalties, with all deference, I cannot subscribe to the conclusion. We know that statutes have frequently been passed in aid of the common law, and to render the offence more penal. This is the case, as it respects *champerty* and *maintenance*; so in the statute of the 2d *William* and *Mary*, (sess. 2. chap. 8. sect. 2.) against keeping hogs in the streets of *London*. A variety of other cases might be stated.

The statute to prevent the storing of gunpowder within parts of the city of *New-York*, has been mentioned, in support of the position, that anterior to that statute, there existed no restraint. It is liable to the same answer that has already been given to the statute of *Geo.* III. that it creates specific and additional penalties, and goes into a variety of detail; but it by no means proves that it was not an offence at common law. In a case in 12 *Mod.* 343.† cited by the counsel for the people, † *Anonymous* it appears, that "a person was indicted for a nuisance, for keeping several barrels of gunpowder, in a house in *Brentford*

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Town, sometimes two days, sometimes a week, until he could conveniently send them to *London*." Among other resolutions of Chief Justice *Holt*, are these, "that to support that indictment, there must be apparent danger, or mischief already done and that though gunpowder be a necessary thing, and for defence of the kingdom; yet if it be kept in such a place as is dangerous to the inhabitants, or passengers, it will be a nuisance."

The principles here laid down, are supported by considering the definition of this offence, and the decisions in analogous cases. In the case of *The King v. White and Ward*, (1 Burr. 333.) which was an indictment for manufacturing offensive liquors, near the king's highway, and near the dwelling-houses of several of the inhabitants, Lord *Mansfield* says, "It is not necessary that the smell should be unwholesome; it is enough if it renders the enjoyment of life and property uncomfortable."

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Would it admit of a doubt whether there was any existing remedy, if a powder-mill should be erected, for the manufacture of that article, in a large and populous town? It appears to me impossible to say, that our citizens are remediless, in such a case. If the law yields them protection from a *communis rixatrix*, can it withhold protection where their lives and their properties are jeopardized? I cannot hesitate to conclude, that powder may be kept in such quantity, and in such manner, as to render the person keeping it guilty of a nuisance.

If this be so, from what circumstance are we to infer that the defendant is not culpable? In examining this point, the place, and quantity kept, are alone to be inquired into, because, if it be so intended, as I think it is, that the defendants are not to be considered as remiss in their attention to the powder, it does not follow, that under the custody of even prudent and careful persons, disasters might not happen, or that this house, the receptacle of the powder, might not be struck with lightning. The place, as stated in the indictment, is a house near the dwelling-houses of divers citizens, and near a certain public street at *Brooklyn*. In the case already cited from *Burrow*, *Ld. Mansfield* considered the term *near*, as a sufficient laying of the offence, and he adds, "The very existence of the nuisance depends on the number of houses, and concourse of people, and this is a matter of fact to be judged of by the jury." So here, whether this *dépôt* of the powder, as proved, would render this a nuisance, was matter for the jury, and we are not to suppose their finding against the truth of the facts. The quantity, I think, was also matter for the consideration of the jury, depending on various circumstances, of which it is impossible for us to judge. Though we have the opinion of our legislature, who interdict the keeping of more than 28 pounds in any one place, in the city of *New-York*,
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except in magazines, and even that is to be separated into four parcels, in stone jugs, or tin canisters, I can find no objection to the indictment in respect to the quantity.

The defendants' counsel have urged, that we are to intend, that this is a powder-house well protected, or that it was a house used by the defendants for storing powder, *before* *the other houses at *Brooklyn* were erected. It is necessary only to say, that such intendments would be without any basis to support them, and directly against the finding of the jury.

I consider the defendants as convicted legally of a nuisance, and that judgment should pass on them for this offence.

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THOMPSON, J. This case comes before the court on a motion in arrest of judgment. The indictment against the defendants is for a nuisance. In determining whether judgment ought to be rendered on the verdict of the jury, we can look only to the offence, as charged in the indictment. We cannot judicially travel out of the record, to inquire whether such facts do exist, which, if charged, would warrant a conviction of the defendants: we are only to determine, whether the indictment before us, presents such facts as, in judgment of law, amount to a nuisance. I am satisfied it does not.

The indictment contains two counts. [Here the judge stated the words in which the offence was charged in the first count.] The whole charge alleged against the defendants, when stripped of the formal parts of an indictment, is, that they *kept 50 barrels of gunpowder in a house, near dwelling-houses, and near the public street*. The indictment is not to be extended, by inference or implication. It cannot, therefore, be intended, that the house was insufficient for the purpose to which it was appropriated, or that due and ordinary care was not used in keeping the powder. If so, it appears to me to be too broad a rule to adopt, that 50 barrels of *gunpowder*, kept in a *proper* house, near dwelling-houses, and near a public street, shall, *per se*, be deemed a public nuisance. Such circumstances may exist, as to make it a nuisance; but those circumstances must be stated upon the indictment. (1 *Burr.* 337.)

The *English* statute, and the statute of this state, regulating the manner of keeping and carrying gunpowder, are not declaratory acts, but contain new provisions, and restrictions, which afford an inference, that the common law stood in need of some aid to guard against the evils apprehended *from the keeping of gunpowder. (4 *Black. Comm.* 168.)

The second count in the indictment, is still more clearly defective than the first, and needs only to be stated, to show that no crime is there charged against the defendants. The allegation it contains, is, substantially, that the defendants caused to be carried through the common and public street, in the

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town of *Brooklyn*, two casks of gunpowder, in a cart, the wheels of which were bound with iron. The manner in which they were secured, or the quantity of powder contained in the casks, is not stated. The sympathy of the law for the fears of mankind, would be great, indeed, if the allegation contained in this count would constitute a public nuisance. There is nothing stated, from which the court can intend the existence of real danger.

My opinion, therefore, is, that judgment must be arrested.

LIVINGSTON, J. Whether a powder-house, *near* private dwellings, and a public highway, be a common nuisance, is the only question on the first count of this indictment. I say *powder-house*, because, although the building is not described *as such*, it may fairly be presumed, from the indictment, to have been erected, and maintained for no other purpose. If it had been a dwelling, or any edifice improper in itself, for keeping this article, it would have been so stated. In addition to this, the fact of its being a brick building, constructed for the storing of powder, and secured by conductors, and every other usual guard against accidents, has come to my knowledge in such a way, as will justify my now taking notice of it.

This is the second indictment tried before me for this nuisance. On the first trial, it appeared that the store was strong, built of most suitable materials, and well defended against every probable danger; nor was there any pretence of its being negligently or improvidently kept.

The right of manufacturing, and vending an article, so essential to public defence, and of such extensive private consumption, will not be denied. From this must follow the right of storing it either for sale, or until it be wanted for national, or other purposes.

[* 84] The only difficulty is, to say, how, and where, it shall be *placed: here no other rule can be prescribed, but by the legislature, without excluding its use altogether, than that of keeping it any where, at the option of its owner, provided the lives of the surrounding, or passing inhabitants, be not thereby exposed to probable danger, either from the place, or manner of keeping it. If *mere possible* injury be a ground for a prosecution, it will amount to a total proscription of the commodity, unless in very small quantities indeed; for who can say that lives may not be lost, or houses destroyed, by an explosion of the hundredth part of the quantity which is alleged to have been stored in this building; and yet, because such an event be not impossible, a shopkeeper at *Brooklyn* would hardly incur the penalties of a nuisance, by keeping a reasonable quantity at a time, to retail, though more real danger is to be apprehended from such practices, than from much larger quantities in a powder-magazine. In the latter place, it is only visit

ed in the day, and by persons who will use more than common precaution, from the very circumstance of there being more than an ordinary quantity collected in one spot, and as they will inevitably be the first and certain victims of an explosion. Except when thus visited, there can be little or no danger. It is never approached by fire, and from the effects of lightning it is protected by its rods. A safer mode of keeping this article than in a building thus constructed, cannot well be devised; but if it be not permitted to place them *near* to any dwellings, or highways, which, by the by, is not a very definite term, who would be at the expense of their erection? If a desert spot, at a great distance from any habitation and road, must be selected, the additional expense of transportation, and danger of robbery, will deter every one from providing such repositories; the consequence of which will be, that it must be kept in houses or places, less safe to those in its vicinity.

The danger of a magazine's exploding, when properly built and secured, is remote indeed; so much so, that a jury of *Queens* county, by whom the first traverse was tried, after a very long examination, acquitted the defendants on that *very ground*; for only one witness was produced, who had ever heard of such an event, and that but once. (a) On the trial of *the second indictment, by a jury from *Kings*, that point was not submitted to them, because a majority of the court determined, as a question of law, that a powder-house, thus situated, however built or maintained, was a nuisance, so that the fact of its erection was alone before them. I was well satisfied myself from the former investigation, that the probability of an explosion was too remote, to justify the apprehensions, which many of the witnesses, who lived in the neighborhood, seemed very honestly to entertain. The jury, who acquitted the defendants, were of the same opinion, though many of them must frequently have passed the noxious building in their way to and from the *New-York* market. This opinion acquires some strength from the silence of our books, and as there does not appear among the various printed forms of indictments, a single precedent to suit the present case. The district attorney produced none, and those to which he referred only established what was not denied, that animals, which it is lawful to keep, and which are not nuisances, *per se*, may, under certain circumstances, become so. Thus *bulls*, *dogs*, and many other beasts, if particularly vicious, or dangerous, and carelessly kept, are regarded as common nuisances. Precisely on this footing, stand powder-houses. Of themselves they are innoxious, although not distant from mansions or highways, unless negligently secured or attended.

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(a) It so happened, that, on the 26th of *August*, 1806, the very powder-magazine in question, with above 400 quarter casks of powder in it, blew up. By the explosion, the windows of the church, and of several dwelling-houses, were broken to pieces, but no lives were lost.

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The only case (12 *Mod.* 342.) which bears the semblance of an authority, was decided at *nisi prius*; for that of *Rex v. Taylor*, (2 *Str.* 1167.) does not state where or how the powder-house was kept. And whether the house, whose owner was indicted, was a private dwelling, or one erected for the purpose and well secured, does not sufficiently appear. The point resolved, however, was not that a powder-magazine was not, in itself, a nuisance, but that to render it such, there must be "*apparent danger, or mischief already done*;" for, as Lord *Holt* well remarks, "though gunpowder be a necessary thing, and, for defence of the kingdom, yet if it be kept in *such a place* as is dangerous to the inhabitants, or passengers, it will be a nuisance." This is a rule too *reasonable not to command our ready assent, and if the jury had passed on this point, there would be no hardship in rendering judgment on the verdict; but they were told by me, in compliance with the unanimous opinion of the magistrates, who sat in the *oyer and terminer*, that a powder-house was, *ipso facto*, a nuisance, and not a witness was examined to show the apparent danger of the one in question. The transaction having passed exactly as is here stated, it would be folly to suppose, contrary to what I know to be the truth, that the defendants were convicted upon the probable danger to which the public were exposed, especially, when the form of the indictment is not such, as necessarily to lead to this conclusion. The mere laying a thing to be "*ad commune nocumentum*" is not sufficient, but the court must examine, says Mr. Justice *Fowler*, whether the fact laid implies a nuisance.

If the rule of Lord *Holt*, and which is here adopted, be not a safe one, it is better that the legislature should interfere, than to put these buildings under the unlimited control of a jury of the *vicinage*, who, however honest, will be more or less influenced by imaginary fears, which artful men will not fail to cherish and increase. Both in *England*, and in this country, such interference has taken place, which furnishes a pretty strong argument against powder-houses being nuisances at common law. By the stat. 12 *Geo.* III. c. 61. the making, keeping and transporting of gunpowder is regulated under heavy and various penalties. This act, which has not declared any of the offences therein enumerated a common nuisance, also directs that powder-houses should be erected of the same materials of which this is composed.

The only act we have relating to this matter, is confined in its operation to the city of *New-York*; the legislature not having thought proper to extend its provisions to other districts of the state. This statute prescribes penalties, for keeping more than a certain quantity in any one place, in the city, except in the public magazine at *Fresh Water*, or in a different manner than is there enjoined, *and regulates the manner of its carriage through the city; but also omits making any of the offences

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common nuisances. It is not hence contended, that keeping this article in a powder-house, properly constructed, may not, in cases of gross negligence, become dangerous, and a nuisance; but that the storing of it, in this way, is lawful in itself, and not in every instance a nuisance, on account of the building being in the neighborhood of dwelling-houses, or contiguous to a highway.

The only difficulty I feel in this cause, arises from the manner in which it is brought before us, and not from any intricacy in the real question, which, from what passed at the trial, I know it was the intention of both parties to submit. But besides the answers already given to the argument drawn from a probability that the jury proceeded on the ground of negligence, there is another, which is suggested by a palpable defect in the indictment. It states that the defendants did "*unlawfully* receive and keep, and yet do keep, in their house, fifty barrels of gunpowder," which is the only alleged cause of the hazard complained of. Now, if it be not unlawful, as has been shown, to store powder in this way, we cannot give judgment against the defendants, without recognizing a principle, which must end in the demolition of every powder-magazine in the state. It is essential that every indictment of this kind, where the principal act is lawful, should state, with precision, what has rendered it otherwise, that is, from what causes arise the dangers which it is contemplated to suppress. In this instance, the prosecutor ought to have alleged a want of care or some negligence in the manner of its storing or keeping; because, whether a lawful act becomes a nuisance in a particular way, or in consequence of inattention, is oftentimes a question of law, on which a defendant is not obliged to acquiesce in the opinion of a jury. But of the judgment of a court he will be debarred, if bills may be drawn in this general way, and every defect supplied by presumptions (which, in this case, are directly against the truth) that every thing was proved necessary to constitute a nuisance.

*I take no notice of the second count, because no attempt was made to support it.

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My opinion is, that it is not unlawful, except in the city of *New-York*, to keep gunpowder in a magazine properly constructed, and secured, though the same be *near* to dwelling-houses, and a public street; but that if, by negligence, or want of care, it becomes dangerous, the owner may be indicted; and further, that such negligence, being the *gist* of the offence, should appear of record, so that the grounds on which a jury proceed may not be matter of conjecture, but be tested by the acts laid in the indictment. No negligence, or want of care being stated, and knowing, judicially, that none was proved, I am of opinion that judgment must be arrested.

KEN., Ch. J. The first count in the indictment merely

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charges, that the defendants kept fifty barrels of gunpowder in a certain house in *Brooklyn*, near dwelling-houses and near the public street. It does not state the manner in which the house and powder were kept, and the validity of the count depends upon this general question, whether fifty barrels of powder, kept in a house near dwelling-houses and the public street, is, *per se*, a nuisance. There is no allegation that the house or powder were carelessly kept, and we must consider the case, as if it were kept with the greatest discretion and security. The indictment cannot be extended by inference or implication. The only question is, whether the *facts laid* imply a common nuisance. I am clearly of opinion that they do not, and that a powder-house near dwelling-houses may, or may not, be a nuisance, according to circumstances, and which circumstances must be explicitly stated in the indictment, so that the defendants may be prepared to meet them, and so that the court may judge of their force. (*Hawk.* book 1. c. 76. s. 88.)

The books contain very few cases on the subject. There is an anonymous case in 12 *Mod.* 342. and said to have been decided before *Holt*, Ch. J., at *nisi prius*, on an indictment for keeping several barrels of gunpowder in a house in *Brentford*, till they could be conveniently sent to *London*. The indictment is not given, and we cannot, *therefore, know under what circumstances the powder was charged to have been kept, but from the temporary deposit of it, we may infer that it was not deposited in a house well prepared for its reception. In that case *Holt* is said to have ruled, that to support the indictment, there must be apparent danger, or mischief already done; and that if the house where the powder was kept, was appropriated for that use before the houses near by were erected, it is no nuisance, and that if gunpowder be kept in such a place, as it is dangerous to the people, it becomes a nuisance. This case, as far as it is any authority, goes in confirmation of the principle, that the time, place and manner are all important and essential in determining, whether a powder-house amounts to a nuisance; but considering the loose manner in which this case is reported, and the book in which it is found, it is not entitled to much, if any, consideration. The case of *The King v. Taylor* (*Str.* 1167.) was also cited, but it throws no light on the question; it states merely the fact that the Court of K. B. granted an information against the defendant, as for a nuisance, for keeping great quantities of gunpowder to the endangering the church and houses where he lived.

The inference to be drawn from the *British* statute of 5 *Geo.* I. c. 26. is certainly of very considerable weight in the argument, that a powder-house near dwelling-houses is not of itself, and under all circumstances, a nuisance. That statute recites, that great quantities of gunpowder were frequently kept in warehouses and other places, in and about the cities of *London* and *Westminster*, to the apparent danger of the inhabitants

and it enacts, that from a certain day thereafter, it should not be *lawful* to keep above six hundred weight, at one time, in any warehouse or other place within the said cities ; and it is worthy of notice, that the statute also declares, that after a certain day, it should not be *lawful* to carry through the streets more than two thousand weight of gunpowder at one time, and particularly prescribes the mode of carriage. If the present indictment be good, these stores of gunpowder, within *the city of *London*, were probably all nuisances, as they must have been near dwelling-houses and other buildings, as well as near public streets. It can hardly, however, be supposed, that if they were so, the frequent use of them would have been endured, and that it would have been deemed requisite to have declared, that after such a day, they should be unlawful. It is not unfrequent for a statute to come in aid of the common law, by giving a new remedy, or additional penalties. The case of keeping swine within the paved streets of the city of *London*, where the houses are contiguous, is mentioned as an instance ; but the language of the stat. of 2 *W. & M.* sess. 2. c. 8. s. 20. is in that case, very different. It declares, that for the *better keeping* the streets, &c., no person shall breed or keep swine under the pain of forfeiting them, and does not declare that the practice thereafter shall be deemed unlawful, for the common law had already made such a declaration. (2 *Salk.* 460.)

The second count in the indictment admits of much less doubt than the first. It contains only the naked fact, that the defendants caused to be carried through the street ten casks of powder in a cart, the wheels of which were bound with iron. The quantity of powder in these casks, or the manner in which they were secured in the cart, is not stated, and it appears to me impossible to adjudge that the act alone amounted to a nuisance, however well the powder might have been guarded from accident, and however small the quantity might have been. The fears of mankind will not alone create a nuisance, without the existence of real danger. (3 *Atk.* 750.)

I am of opinion, accordingly, that judgment ought to be arrested.

TOMPKINS, J., having been concerned as counsel, gave no opinion.

Judgment arrested.

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*SERVICE *against* HEERMANCE.

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THIS was an action of debt on a judgment in this court. The defendant pleaded, that after the rendering the said judgment, and before the commencement of the present suit, to wit, on

A plea of a discharge under the insolvent act, need not set

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forth specially all the proceedings previous to the certificate of discharge. It is sufficient if the discharge itself be set forth *verbatim*. (a)

Where new matter is alleged in a plea, it must conclude with a *verification*.

(a) See *Rosenvelt v. Kellogg*, 20 Johns. Rep. 278. *Frary v. Dakin*, 7 Johns. Rep. 75. *Johns. Rep. 34*. *Wyman v. Mitchell*, 1 Cow. Rep. 316. *Smith v. Mumford*, 9 Cow. Rep. 26. *Wheeler v. Townsend*, 3 Wend. Rep. 547. *Cleveland v. Rogers*, 6 Wend. Rep. 438.

the 4th day of *June*, 1803, the defendant, being an insolvent debtor, within the true intent and meaning of the act, for giving relief in cases of insolvency, did, in conjunction with three fourths of his creditors, &c., present a petition to the recorder of the city of *New-York*, (which petition was in the usual form,) and that such proceedings were thereupon had, agreeably to the said act, that the said recorder, on the 26th day of *July*, 1803, did discharge the defendant, by a writing under his hand and seal; (which was set forth *verbatim*, in the plea.) The *discharge* recited the several proceedings, such as the petition, affidavits of creditors, accounts of the debtor on oath, notice to creditors to show cause on a certain day; that no cause being shown, an assignment was made, and a certificate thereof given by the assignees, and thereupon, that the defendant was discharged from all debts then due, or contracted before that time. The plea concluded with an averment as to the identity of the defendant, and a verification.

To this plea the plaintiff *demurred specially*, and assigned for causes of demurrer; 1. That the defendant did not, in his plea, set forth *specially* all the facts and proceedings before the recorder, antecedent to his discharge; but merely alleged that *such proceedings were thereupon had agreeably to the act, &c.* 2. That the plea concludes to the court, when it ought to have concluded to the country. To this there was a *joinder in demurrer*.

The demurrer was argued, at the last term, by *Riggs*, for the plaintiff, and *Harison* and *Evertson*, for the defendant.

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SPENCER, J., now delivered the opinion of the court. The 11th section of the insolvent act authorizes the *pleading of the general issue, and giving the special matter in evidence, when the insolvent is prosecuted for a debt existing antecedently to the discharge; but this is a case where that provision became inoperative, because there is no general issue which could have been pleaded triable by the country; hence, the necessity of a special plea.

There are, then, only two questions for consideration.

1. Whether the defendant was bound to set forth any thing further than his discharge under the act, by an officer having competent authority to grant it?

2. Whether the plea is correct in concluding to the court?

The plea stating the facts already mentioned, gives to the recorder jurisdiction of the case; and the discharge is, by the 7th section of the act, declared to be conclusive evidence in all courts within this state, of the facts therein contained. It is not pretended that the discharge omits any material fact, but it is insisted, that the facts themselves should have been pleaded, and not the evidence of those facts. In the very statute now under consideration, as well as in various others, our legislature have evinced a strong inclination to render

pleadings more succinct; and I take it to be a salutary principle, that where the matter tends to great prolixity, a concise manner of pleading is to be admitted. (*Barton v. Webb*, 8 *Term Rep.* 461.) It is now settled, that in setting forth the proceedings of an inferior court, it is sufficient to say, that a plaint was levied, and thereupon, *taliter processum fuit*, (5 *Com. Dig.* E. 18. 402. 2 *Lev.* 81. *Doe v. Parmiter*. 3 *Lev.* 243. *Adney v. Vernon*. *Ibid.* 404. *Patrick v. Johnson*. *Show-er*, 48. *Simpson v. Merrille*.) such an act was done by the court. Those judicial officers, authorized by law to grant discharges to insolvents, I conceive to be, *pro tanto*, clothed with all the powers of a court, and, indeed, as it respects discharges on petitions to a judge of the common pleas, the court, *eo nomine*, hear and determine. The plea then having stated enough to give the magistrate jurisdiction, and the discharge being conclusive evidence, I think the particular facts need not be set out. In the case of *Cotterel v. Hook*, (*Doug.* 97.) the defendant pleaded the insolvent debtor's act, in *discharge of his person. The plea stated, that being committed to the King's Bench prison, and continuing so, at the time of his discharge, at a general quarter sessions held, &c., he was discharged according to the form and effect of the act. In *Marks v. Upton* (8 *Term Rep.* 305.) is precisely the same plea, and these pleas were not objected to. In the case of *Ludbrooke v. James*, (*Willes*, 201.) the chief justice says, that if it had appeared that the sessions had jurisdiction, it would have been sufficient to have said generally, that the sessions had discharged him, and that they would not inquire into any facts necessary to be done by him, in order to obtain his discharge, of which the sessions were the only and the proper judges, and must be taken to have adjudged rightly. The insolvent act requires publications in three different papers, and notice upon the door of the court-house or gaol of the county where the insolvent resides. Creditors have not only a right to be heard, but may adduce witnesses in support of their objections. The law is sedulous to give them warning, and if, after notice, they decline to appear, or appearing, fail in their objections, it would be rigorous and absurd to compel the insolvent to state in his defence, either what has not been denied, or sufficiently supported. To what end should all the facts conducing to his discharge be pleaded? Certainly they are not traversable, because the act makes the discharge conclusive evidence, and because, without it, the law would intend the proceedings to have been regular. On this principle, I consider the present plea, with respect to the several objections made to it, for not setting out all the facts essential to have been proved before the recorder, perfectly unexceptionable. I will only add on this point, that the case of *Cole v. Stafford*, (1 *Cames*, 249.) contains the same doctrine now laid down

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Next, as to the conclusion of the plea; there is no rule in pleading better, or more universally established, than this, that whenever new matter is introduced, the pleading must conclude with an averment. (*Doug. 60. Chandler v. Roberts*, and the cases there cited. 2 Term Rep. 576. *Henderson v. Withy*.) The reason is obvious, because the plaintiff might otherwise be precluded from *setting forth matter which would maintain his action, though the matter pleaded by the defendant be true. Had the present plea concluded to the country, the matters of fraud which the plaintiff might have replied, under the 12th section of the act, would have been excluded. The demurrer must be overruled; but as the plaintiff has asked leave to withdraw it, should the court think it untenable, it is the opinion of the court, that the plaintiff have leave to withdraw his demurrer, on payment of costs.

Demurrer overruled.(a)

(a) See S. C. 2 Johns. Rep. 96. *Cruger v. Cropsey*, 3 Johns. Rep. 242

LUDLOW and others, Trustees for all the Creditors of
RANDALL, (an absent Debtor,) against VAN RENS
SELAER.

A note made in France, but payable to a person in America, is valid here, though not stamped according to the laws of France. Our courts do not take notice of the revenue laws of foreign countries.

THIS was an action of *assumpsit*, on a promissory note made by the defendant, in 1798, for 3,400 livres, payable to *Alexander Stewart*, or order, on demand, for value received of *Paul R. Randall*, which note was endorsed to the plaintiffs, as trustees of *Randall*. The declaration also contained a count for money had and received. Plea *non assumpsit*. The cause was tried at the *New-York Sittings*, on the 5th of *January*, 1805, before Mr. Justice *Livingston*. The note was offered in evidence on both counts, and it was admitted at the trial, that the note was made at *Paris*, in *France*, where the defendant and *Randall* then resided; that *Stewart*, the payee, who was the mere agent of *Randall*, at that time, and ever since, has resided in *New-York*, where the note was to be paid; that by the laws of *France*, existing at the time, all notes for the payment of money were required to be stamped, without which no note could be recovered in that country. A verdict was found for the plaintiff for 511 dollars and 34 cents. On a case reserved, containing the above facts, the following question was raised for the opinion of the court: Whether the plaintiffs could recover on a note, not having a stamp, as required by the laws of *France*, where it was made.

**Harison*, for the plaintiffs. Where a contract is made in reference to another country, in which it is to be executed, it must be governed by the laws of the place where it is to have its effect. (*Robinson v. Bland*, 2 Burr. 1077.)† The note in question was made payable at *New-York*, and the parties must have had in view the laws of the *United States*. At that time, a stamp act existed in this country,‡ as well as in *France*. By the laws of the *United States*, a note not stamped was not, therefore, void. The stamp was only necessary to render it admissible as evidence in a court; and it might be stamped at any time, on paying a higher duty,§ so as to enable the holder to recover on the note in a court of justice.|| The stamp act of the *United States* was repealed on the 30th June, 1803,¶ so that notes previously issued, and remaining unstamped, are now as available at law as if no such act had ever been made.

The case of *Alves v. Hodgson* (7 Term Rep. 241.) may, perhaps, be cited to show that a note made at *Jamaica*, and payable at *London*, and not stamped according to the laws of that island, was considered as a nullity. It may be said, however, that *Jamaica* was a part of the *British* empire, and the stamp duty a matter of revenue. In that case, *Ld. Kenyon* went no further than to say, that the note, not being stamped, could not be received in evidence; but that the party might, notwithstanding, recover on the *quantum meruit*, and awarded a new trial, to give the plaintiff an opportunity of availing himself of that count.

If a contract, on the face of it, appears to be valid, our courts will not undertake to enforce the revenue laws of a foreign country,†† by declaring it void. Yet admitting, that quasi a note under the revenue law, it was a nullity, still the original contract, for which it was given, remains in force between the parties, and the plaintiffs are entitled to recover on the other count in the declaration.

Tenbrook, contra, contended, that all contracts must be governed by the laws of the country in which they are made. As this note was void in *France*, and of no operation *there, it could not be recovered here; for this court will take notice of the laws of the place where the contract is made. Though the note was made payable to a person residing in *New-York*, yet the real parties were both resident in *France*, at the time the note was made, and their acts must be considered as governed by the laws of that country. He cited 7 Term Rep. 241. *Cowper*, 341. 1 H. Black. 148. *Loft*. 138—154. 2 Str. 733. *Burrows* and *Jemino*, in *Canc.*

LIVINGSTON, J., delivered the opinion of the court. The payee of this note, though it was made in *France*, resided at the time, within this state, where it was to be paid. As we do not sit here to enforce the revenue laws of other countries, it is perfectly immaterial, in a suit before us, whether or not the

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† S. C. Black.
234—256.

‡ This act was
passed the 6th
July, 1797. See
Laws of U. S.
vol. 4. p. 22. 5th
Cong. sess. 1.
c. 11.

§ 10 Dollars.

|| Laws U. S.
vol. 4. p. 31. vol.
5. p. 97. 6th
Cong. sess. 1
c. 31.

¶ Vol. 6. p. 58.
7th Cong. sess
1. c. 19.

†† See *Holman*
v. *Johnson*,
Comp. 343.

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note was stamped according to the laws of *France*. Such a duty is not imposed upon us, nor if it be admitted that the law of *France*, in this instance, has been violated, are we bound to take notice of such violation. If it were otherwise, it might well be said, that the parties never contemplated exacting the payment of this note in that country, and this would form a sufficient excuse here, for not adhering rigidly to a matter, extrinsic and formal, as to the contract, though it might be necessary, in order to sustain an action in the courts of *France*.

Judgment for the plaintiffs.

SNELL, STAGG and Co. *against* MOSES and Sons.

In an action of *assumpsit*, on the sale of goods, for not delivering goods of a certain description, but of a different sort and quality, either an express warranty or fraud

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must be alleged, and the plaintiff must prove the allegations precisely as they are laid. (a)

(a) See *Onida Man. Society v. Lawrence*, 4 Conn. Rep. 440, and the *American* cases there cited. *Snell v. Colgate*, 20 Johns. Rep. 196.

THIS was a special action on the case. The declaration contained four counts. The first count charged, that in consideration that the plaintiffs, at the special instance and request of the defendants, would buy of them eight bales of a certain sort of *India* goods, called *blue guineas*, at and for the price of 5 dollars and 50 cents for every piece, the defendants undertook, and promised to "send, or deliver, to the plaintiffs, eight bales of *blue guineas*, containing in the whole 1,200 pieces, and that *each and every of the said bales should contain *blue guineas* only, and no other sort or kind of goods, and should be of the usual and customary length and breadth, which pieces of *blue guineas* commonly contain; [and should be equal, in quality and goodness, to a certain piece of *blue guineas*, produced and shown to the said plaintiffs, as a sample of the said bales of *blue guineas*, to be sent or delivered to the said plaintiffs.]" And the plaintiffs averred that they did buy, &c., for the said price, &c., but that the defendants did not send and deliver to the plaintiffs eight bales, &c., of the usual and customary length and breadth; [and equal in quality and goodness to the sample so produced, and containing *blue guineas* only, and no other sort or kind of goods;] but, on the contrary, that the bales sent, contained a few pieces of *blue guineas*, mixed with divers other sorts and kinds of goods of inferior quality, color and goodness; and that the small quantity of *blue guineas* sent, were not only inferior in quality and goodness to the sample produced, but that they, and the other sorts of goods mixed with them, were narrower and shorter than such goods usually are, and were otherwise in bad condition, &c. The second count was like the first, omitting the words between crotchets, relative to the sale by *sample*.

The third count stated, that in consideration that the plaintiffs, at the special instance and request of the defendants, had

promised the defendants to pay to them the sum of 6,600 dollars, when they, the plaintiffs, should be thereto afterwards requested, the defendants promised to deliver to the plaintiffs, eight bales of a certain sort or kind of goods, called *blue guineas*, containing a large number of pieces, to wit, 1,200 pieces, of *blue guineas*, and that each and every of the said bales should contain *blue guineas* only, and no other kind of goods, and should be the usual and customary length and breadth, and of the value of 5 dollars and 50 cents *per* piece, &c., when they, the defendants, should be thereto afterwards requested; and avers, that the defendants did not deliver goods of that description, &c., but instead thereof, deceitfully and fraudulently delivered the plaintiffs eight bales, containing a small number of *blue guineas* intermixed *with divers other sorts of goods, all of inferior quality, &c. &c. The fourth count was for money had and received to the use of the plaintiffs. The defendants pleaded *non assumpsit*.

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The cause was tried before Mr. Justice *Livingston*, and a special jury, at the *New-York Sittings*, on the 15th of *December*, 1804. On the trial, the plaintiffs produced in evidence the original bill of parcels from the defendants, for 3 bales of *blue goods*, at 5 dollars and 50 cents *per* piece, under which was written, "Imported in the ship *Canton*, from *Bengal*, entered by *Willing & Francis*, at *Philadelphia*, 12th *September*, 1801. From *Philadelphia*, &c. by *Isaac Moses & Sons*, *October* 6th, 1801." The cartman, who was employed by the plaintiffs to carry the goods, testified, that he inquired for the *blue guineas*, purchased of the defendants, who delivered him the bales which he took away, but he did not hear the defendants, or any other person in the store, call them by the name of *blue guineas*. It further appeared, from the depositions read in evidence, that the goods in question were parcel of a quantity purchased of *Willing & Francis*, of *Philadelphia*, by the defendants. *Francis* testified, that they were sold to the defendants as *blue cotton goods*, and that they were not of the description of goods called *blue guineas*, but were imported from *Calcutta*, and described in the invoice delivered to the defendants by the *Indian* names of *gurrahs*, *marahagonges*, *cossas*, and *blue gurrahs*; that, at the time of sale of the goods to the defendants, *Willing & Francis* offered, at their own expense, to open the bales, to ascertain whether any of the goods were damaged or not; but *S. Moses*, one of the defendants, who made the purchase, said it was unnecessary, and took the goods away, being in haste to ship them to *New-York*. *Marahagonges* and *blue guineas* are of different lengths and breadths, as well as quality; the former are manufactured at *Bengal*, of a flimsy, coarse cloth, badly dyed, containing from 15 to 16 1-2 yards in length, and from 3-4 to 7-8 of a yard wide; but *blue guineas* are of the manufacture of the coast of *Coromandel*, of a firm good fabric, a fine dye, and generally

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18 yards long, and 9-8 yard wide. *During the year 1801, *Willing & Francis* did not sell any *blue guineas* to the defendants, nor were there, to their knowledge, any goods of that name in *Philadelphia*, in the autumn of that year.

The plaintiffs, immediately after the purchase of the goods in question, shipped them to *Curaçoa*; and it appeared from the evidence of their correspondent, that on opening the bales, they were found not to be of the quality of goods he had been accustomed to receive of the plaintiffs, as *blue guineas*, but were very coarse, shorter and narrower than goods of that name generally are, and some of them of a light blue color. Pieces of inferior quality and color were intermixed with those of better quality and color, and the difference in value was estimated at 50 *per cent*. Had the goods been of the proper quality and kind, they might have been sold for 7 dollars *per piece*, but were afterwards sold to various persons at inferior prices.

Two pieces of the goods, sold by the defendants to the plaintiffs, which were a fair sample of them, were shown to the jury, and were admitted to be a species of goods manifestly different in color, texture, length and breadth, from *Madras blue guineas*, and in all respects, inferior to that species of goods.

Robert Lenox was called as a witness, to prove a conversation between him and one of the defendants, in relation to the goods in question, and declared that he could not recollect the expressions used, but would give his impressions as to the substance of the conversation: this the defendants' counsel objected to, but it being allowed by the judge, (a) the witness stated, "that on observing to one of the defendants, that it was impossible that *blue goods* should be sold for *blue guineas*, the latter replied, that people in general were unacquainted with the true names of the different kinds of *India* goods, and frequently applied for them by wrong names, and that when they asked for *blue guineas*, he was not so much governed by the names made use of, as by the market to which they were going, and showed goods accordingly." *William Alsee*, another witness, was called by the plaintiffs, to prove the declarations and conduct of the *defendants in relation to another parcel of *India* goods, purchased by him of the defendants, at that time, before the goods in question were purchased by the plaintiffs. The evidence was objected to, on the part of the defendants, but the objection was overruled by the judge. The witness stated, that in the beginning of *October*, 1801, he applied to the defendants, to purchase *blue guineas*, for the *African* coast, and was shown one bale, which the defendants said was all they had at that time, but that they expected some shortly from *Willing & Francis*; that a *Frenchman* who

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(a) See *Cutler v. Carpenter*, 1 Cow. Rep. 81.

accompanied him, said, that this bale was real *blue guineas*. He afterwards took the number of bales he wanted; and that when the goods were opened on the *African* coast, they were found much damaged in the inside.

It further appeared that the price of *blue marahagonges*, about the time of the purchase, was 2 dollars and 50 cents, and *Madras blue guineas*, 6 dollars per piece.

The defendants moved for a nonsuit, upon the ground that the evidence varied from, and did not support the plaintiffs' declaration; which motion was overruled by the judge.

The clerk of the defendants then testified, that it was the practice, in the store of the defendants, to show their goods, by stripping off the exterior covering of the bales, and permitting the purchaser to select for himself.

Several witnesses deposed, that there were various species of *blue goods* from *Bengal*; that *Madras blue guineas* were of superior quality, and that they all were generally inquired for under the name of *blue guineas*. The price of *Madras blue guineas* was, at the time of the sale of the goods in question, about 9 dollars. On this evidence the judge left it to the jury whether the defendants, knowing the goods sold not to be *Madras blue guineas*, had fraudulently sold them to the plaintiffs as goods of that description.

The jury found a verdict for the plaintiffs, for the sum of 2,397 dollars and 19 cents. On a case made, stating the above facts, the defendants now moved to set aside the verdict, and that a nonsuit be entered, on the following grounds: 1. That the evidence of *Lenox* and *Alsee* was inadmissible; 2. That the evidence *produced on the trial did not support the declaration; 3. That no express warranty or actual fraud was proved, one of which was essential to maintain this action; 4. That the damages were excessive, and not warranted by the evidence; 5. For the misdirection of the judge.

Hoffman, for the defendants. The testimony of *Lenox* was inadmissible. The mere impressions of a witness ought never to be received in evidence. They are too uncertain to establish the truth of a fact, and if admitted as proof, it may lead to dangerous consequences. The witness ought to testify, according to his knowledge, and not according to his belief. He may have impressions on his mind, not produced by the facts he is called to prove, but derived from other sources, or his own imagination.

The admission of *Alsee*, to show the declarations and conduct of the defendants towards him, in regard to another parcel of goods, in order to prove the allegations of the plaintiffs in their suit, in respect to a different contract, was unprecedented. No rule of evidence could justify such a mode of proving a fraud, or breach of contract.

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The evidence adduced at the trial did not support the declaration; there is a fatal variance between the allegations and proofs. If the plaintiffs intended to recover on the ground of fraud, it should be clearly and precisely laid in the declaration, and be proved as alleged. There is no pretence that the facts, stated in the first and second counts as to the sale, have been proved.

The plaintiffs must maintain their action, if at all, on the third count. It charges, that the defendants sold to the plaintiffs eight bales, containing *blue guineas* only, of a certain length and breadth, and of a certain value. The bill of parcels, which must be considered as the contract between the parties, reduced to writing, states them to be *blue goods*, and that they came from *Bengal*. On the ground of variance, therefore, between the declaration and the proofs, the plaintiffs are not entitled to judgment. (*Bristow v. Wright, Douglas, 665. King v. Pippot, 1 Term Rep. 235. Parkinson v. Lee, 2 East, 314.*)

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*The verdict was manifestly against evidence. There must be either an express warranty, or fraud in the sale, to enable the plaintiffs to recover. The case of *Sciras v. Woods* (2 *Caines, 48.*) is full and conclusive on this point. It is not pretended that there was any warranty in this case; and no deceit is proved as to the length or breadth of the goods. They were exposed in the store of the defendants; and subject to the inspection of the plaintiffs. *Blue guineas*, properly so called, come from *Madras* only; yet the *Bengal blue goods*, in the ordinary language, and according to the general acceptance of purchasers, have the same denomination. They are all sold under the name of *blue goods*. It constitutes no part of the complaint of the plaintiffs that they were represented as *Madras blue guineas*. They complain only that the goods they received were of an inferior quality, and they are bound by their own averments, and cannot recover for a different cause. Yet the judge, in his charge, left it to the jury on this point, whether the defendants had sold their goods to the plaintiffs, as *Madras blue guineas*, knowing them to be of a different description.

[LIVINGSTON, J. I do not recollect that I used that expression. I left the cause to the jury, on the broad question, whether the goods were sold as *blue guineas*, and not as *Madras blue guineas*.]

Hoffman. There are no other *blue guineas*, except those of *Madras*; all the others are called *blue goods*, or *blue guineas*. One circumstance is conclusive, to show that the defendants never could have intended to have sold these as goods of the same description. The price of *Madras blue guineas*, at the time, was nine dollars a piece, and the plaintiffs paid only five dollars and a half for those they purchased. Yet the jury must have calculated the damages on the supposition that the

goods were represented as *Madras blue guineas*, so that the damages are *excessive*, which forms another objection to the verdict.

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Harison and Riggs, contra. The objection to the testimony of *Lenox* has no weight. Every witness must swear *according to the impressions on his mind; for they are the materials of his knowledge. It was only a more cautious mode of expressing his belief. He meant to state what he recollected; the substance only of what he heard, not the exact words.

The evidence of *Alsee* was proper, as it related to the same parcel of goods; and as he applied for *blue guineas*, and the defendants represented them to him as such, it was fairly to be inferred by the jury, that they knew at the time that they were not. In the case of *Beal v. Thatcher*, (3 *Esp. Cas.* 194.) which was an action for giving a false character, Lord *Kenyon* allowed the witness to state that the defendant had recommended the same person to him to be trusted, for it proved a fraudulent connection between the defendant and the person recommended, and might, therefore, go to the jury."

[SPENCER, J. I have no doubt as to the admissibility of the evidence of *Lenox*; nor do I see any solid objection to that of *Alsee*.]

The answer of the defendants to *Lenox*, shows that their conduct was not fair. Knowing that the goods they exposed for sale were not *blue guineas*, they take advantage of the ignorance of purchasers, who inquire for them under a different name. Honesty and fair dealing should have induced them to have mentioned the difference. *Alsee* asked for *blue guineas*, and they informed him that they should receive a parcel from *Willing & Francis*, yet in the letter of *W. & F.* it is expressly stated, that they did not represent them to the defendants as *blue guineas*, but as *blue goods*; and their invoice specifies them under their appropriate *Indian* names. *Blue goods* is the general name, *blue guineas* the specific appellation. Suppose a farmer were to sell buckwheat for wheat, to a person unacquainted with the difference, and who asked for the latter, would such a deceit be sanctioned in a court of justice? The defendants use the term *blue goods* in their bill of parcels, presuming on the general supposition that they were *blue guineas*, and that the plaintiffs did not know the difference. Fraud is generally to be inferred from circumstances, *and the jury were authorized, from all the facts before them, to make the inference. It was their peculiar province to do so, and the court ought not now to disturb their verdict, on any nice or technical objections, as to the pleadings. Besides, it was agreed by the parties, that the declaration should be considered as if for a *tort*; and there is no variance, as the *deceit* and the *scienter* are the basis of the action. The amount of the verdict does not exceed the actual loss sustained by the plaintiffs.

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Radcliff, in reply. The question as to a nonsuit, is now to be considered precisely on the same grounds, as it stood when the motion was made at the trial, for such is the agreement in the case. The distinction between *tort* and *contract* is not correctly applied. It is true, that in actions of *trespass*, all the circumstances need not be proved precisely as they are alleged; but this action is upon a contract which must be proved *in toto*. The allegations in the third count are not proved.

There is no evidence, even by implication, that the goods should be of the value of 5 dollars and 50 cents a piece, which is a fatal variance. There is no proof of any fraud. The internal state of the bales was not examined; but they were sold as *Bengal* goods, and were understood to be such by both parties. The bill of parcels affords the strongest evidence to ascertain the meaning of the contract; the plaintiffs knew that the goods came from *Bengal*, and yet they admit in their declaration, that some of them are *blue guineas*, and are, therefore, concluded from saying they were not. The plaintiffs possessed as much knowledge of the goods as the defendants; they took them without examination; both parties were equally ignorant of the quality or internal condition, and the purchasers, therefore, must take them at their own risk. Where there is neither express warranty nor fraud, the rule of *caveat emptor* applies.

To support this action, it should be made to appear, that some artifice or deception had been practised by the defendants. The goods are uniformly mentioned as *blue* or *Bengal* goods; the term *Madras blue guineas*, was never used by the defendants. *The price at which they were purchased, shows most decisively that they were not sold for goods of the latter description, which were selling at a much higher rate. If the court have any doubts, they ought to grant a new trial; for the verdict is palpably against evidence, as well as the justice and merits of the case.

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LIVINGSTON, J., delivered the opinion of the court. The only count in the declaration, to which the evidence is pretended to be applicable, is the third, to which, therefore, our examination will be confined. (Here he stated the averments contained in the third count.) If any sale of *blue guineas* be proved, there is no evidence, either that they should be of the usual length and breadth, or of a certain value. It may well be doubted whether the first can be implied; and if there were no warranty or fraud, and it should appear that the bales had not been examined, but that both parties were equally ignorant of the length of the goods, such an inference could not be made. Be this as it may, is there any proof that each piece should be of the value of five dollars and a half? This cannot be presumed, merely from its being the price at which the

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plaintiffs were to take the goods; for if such an implication were to result from that circumstance, such a warranty would be universal, unless there was a stipulation to the contrary. This is an essential part of the contract, for it cannot be said that the jury, in assessing the damages, did not take as their guide the difference between the price paid to *W. & F.* and that at which they were sold to the plaintiffs, under an idea, that it was agreed that the goods should be of the latter value. This rule of estimating the damages, allowing something for the freight from *Philadelphia to New-York*, and other necessary charges, would give about the sum found by the jury. If they proceeded on this calculation, it was wrong, because of the total want of proof of any agreement, that the article should be of a particular value. It was said in the argument, that as the plaintiffs proceeded on the ground of fraud, it was sufficient if the fraud were substantially made out, without inquiring whether the contract were proved specifically as laid in the declaration; but how can it be determined that there was any fraud in the transaction, without knowing precisely what was the agreement between the parties? It is as essential to prove the contract as declared on, with certainty, in that case as well as in any other. This not having been done, the defendants, under the agreement stated in the case, are entitled to a judgment of nonsuit.

Judgment of nonsuit.

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THE UNITED INSURANCE COMPANY *against* SCOTT and SEAMAN.

THIS was an action of *assumpsit*, for money paid, laid out and expended by the plaintiffs for the defendants, and for money had and received, by the defendants, to the use of the plaintiffs. Plea, *non assumpsit*. The cause was tried at the *New-York Sittings*, on the 5th of July, 1803, before Mr. Justice *Livingston*, when a verdict was found for the plaintiffs, subject to the opinion of the court, on the following case.

The defendants and twenty-two others were separate underwriters on a policy of insurance, dated the 2d of March, 1798, on the ship *Niagara*, to Messrs. *F. & P. Rhinelander*, the owners, on a voyage from *New-York to Savannah, in Georgia*, and from thence to *Kingston*, in the island of *Jamaica*. The ship was valued at 15,000 dollars, and the whole insured at 22 1-2 per cent. The *Niagara*, with her cargo, sailed about the 1st of June, 1798, on the voyage insured. The owners instructed the master to proceed to *Savannah*, there deliver his cargo, take in another, and proceed to *Kingston*, and after

The United Insurance Company were insurers on the cargo and freight, and 22 others, were separate insurers on the ship, on a voyage from *New-York to Savannah*, and from thence to *Kingston*, in *Jamaica*. The ship was captured on her voyage, and

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carried into *Porto Rico*. Abandonments were made to the insurers on

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the cargo and freight, and to the separate underwriters on the ship, which were accepted respectively, and the sums insured paid as for a total loss. The ship was afterwards liberated and proceeded to her port of destination, and there delivered her cargo, of which the master, and T. at K. were joint consignees. The whole of the net proceeds of the cargo were applied by them to defray the expense of the necessary repairs of the ship, and also for arming her, &c. In an action by the United Insurance Company against S., as part owner of the ship, for the net proceeds

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of the cargo so taken and applied for the repairs, &c., it was held, that after the abandonment and acceptance, S. was separately answerable, and not as joint partner with the other insurers on the ship, for a proportion of the net proceeds of the cargo, applied to the necessary expenses of repairing the ship, but not for arming or increasing her complement of men: and the

landing that cargo there, to go to *Honduras*, to procure a cargo of mahogany and logwood, and from thence proceed to *London*. The ship, having performed about two thirds of her voyage, was captured and carried into *Porto Rico*, the latter end of *June*, 1798. The owners, after advice of the capture, abandoned the ship to the several underwriters, who accepted the abandonment, and about the 15th of *June*, 1799, paid the amount insured as for a total loss. After their acceptance of the abandonment and payment of the loss, the insurers, on the 17th of *June*, 1799, by writing, appointed *Richard Hartshorne* their agent, and authorized him to take such measures relative to their interests in the vessel insured as he should think best.

The ship was liberated at *Porto Rico*, on the 22d of *January*, 1799, and pursuing her voyage, arrived at *Jamaica*, the 10th of *February* following. A part of the cargo had been sold by the master at *Porto Rico*, to liberate the ship; the residue was delivered at *Jamaica*. The ship, being leaky, was regularly surveyed and great repairs were found necessary to enable her to prosecute her voyage home.

In whatever related to the survey, repairs, &c. at *Jamaica*, the master acted wholly by the advice of Messrs. *Steele & Thompson*, merchants, at *Kingston*, to whom he was addressed by his letters of instruction; and they, with the master, were joint consignees of the cargo.

On the 22d of *February*, the owners, before they had heard of the arrival of the ship at *Jamaica*, wrote a letter to the master, highly approving his conduct, and advising him to return to *New-York* from *Jamaica*, with what freight he could procure, and that they had cancelled the original charter-party. During his stay at *Jamaica*, waiting for the repairs to be made, the master wrote several letters to his owners, under dates of the 13th and 25th of *February*, the 11th and 29th of *April*, *1799, in which he informed them, that he should proceed on the original voyage, pursuant to his instructions. These letters, on or about the 1st of *November*, 1799, were delivered by the agent to the insurers.

The plaintiffs were insurers on the cargo, valued at 5,000 dollars, and on the freight, valued at 7,500 dollars, on both of which policies the plaintiffs paid a total loss, on the 21st of *November*, 1798, in consequence of an abandonment made to them by the assured. The cargo thus insured was sold at *Jamaica*, for 9,727 dollars and 65 cents, and the master, being destitute of funds, applied the whole proceeds, with the advice and approbation of Messrs. *Steele & Thompson*, the merchants at *Jamaica*, to defray the expenses of repairs and disbursements for the ship. With their advice and consent also, the master, on or about the 10th of *April*, 1799, made a new charter-party with merchants of that place, for a voyage from *Jamaica* to *Honduras*, and from thence to *London*. The cargo taken on board, consisted of government stores and troops, for

which he was to receive 2,000 dollars freight to *Honduras*. A few days before the ship sailed from *Jamaica* to *Honduras*, the master received the letter of the 23d of *February*, from the owners, in which they advised his returning to *New-York*; but having previously made the new charter-party, and the cargo being on board, he determined to prosecute the voyage. He accordingly sailed from *Jamaica*, on or about the 1st of *July*, 1799.

Messrs. *Steele & Thompson* wrote to the owners at *New-York*, on the 7th of *July*, informing them of the ship's sailing, of the new charter at 8 guineas *per ton*; that for extra advances to enable the master to pay for the repairs and disbursements of the ship, they had taken a *bottomry bond* upon her, for 2,409*l.* 7*s.* 10*d.* *Jamaica* currency, to be paid out of the freight at *London*, and they added that *the master had certainly gone to no greater expense than could be avoided*. This letter, with the enclosed accounts of the sales of the cargo, and of the ship's disbursements, was delivered, by the original owners, to the agent of the insurers, on or about the 10th of *November*, 1799.

*The master received no letter from any of the insurers or their agent, until after his arrival at *London*; and during his stay at *Jamaica*, he received but one letter, that of the 23d of *February*, from the original owners of the ship. The disbursements of the ship at *Jamaica*, including repairs, commissions, &c., amounted to 17,717 dollars and 52 cents, but no particular account of the repairs was stated. The expenses of the ship at *Jamaica* were increased, by arming her with 16 guns, and augmenting the number of her crew from 17 to 39 men. The sum charged for repairs and fitting the ship for the voyage, under the new charter-party, exceeded the value of the ship at *New-York*, or the sum insured. The ship, after prosecuting her voyage to *Honduras*, sailed from thence and arrived at *London*, the 29th of *November*, 1799.

The present action was brought to recover from the defendants, as joint-owners of the ship, with the other underwriters, the net proceeds of that part of the cargo insured which was sold, amounting to 9,727 dollars and 65 cents. Separate suits were brought against the other underwriters. One of the insurers did not accept the abandonment, nor pay, and afterwards became a bankrupt. All the others accepted and paid, but some of them afterwards became bankrupt.

On the above facts, two questions were made for the consideration of the court: 1. Whether the plaintiffs can recover the whole amount of the net proceeds of the cargo, without joining the other underwriters on the ship with the defendants in the suit? 2. If not, can the plaintiffs recover of the defendants, their proportional part of the said proceeds? If so, how is this proportional part to be calculated? By the amount of the subscription of the defendants, or by what other rule?

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sum that he was to pay, was to bear the same proportion to the whole sum so applied, as the sum subscribed by him to the policy, bears to the whole amount underwritten on the ship

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The case was argued, at the last term, by *Riggs* and *Harrison*, for the plaintiffs, and *Pendleton* and *Hoffman*, for the defendants.

The judges now delivered their opinions.

*THOMPSON, J. The principal questions arising out of this case, are, 1. Whether the defendants are answerable in the present action; and, if so, 2. To what extent?

It cannot be controverted, that the underwriters upon the ship, after the abandonment and acceptance, became owners thereof, and answerable for all necessary repairs and expenses. The acceptance must, I think, have a retroactive effect, and the underwriters be deemed owners from the time the accident happened. They cannot, however, be considered joint-owners, so as to constitute them partners, or so as to make them responsible, one for the other. It certainly will not be pretended, that because they subscribed the same policy, they thereby became joint-partners; they are total strangers to each other; and if being on the same policy would not constitute them partners, I cannot see why accepting the abandonment should make them such. If the loss happens by any of the perils insured against, the underwriters are bound to pay their subscription, whether they accept the abandonment, or not; and if the acceptance constitutes them partners, they are driven to the alternative of relinquishing the subject insured, or of becoming partners, and, of course, responsible for whomsoever may be on the same policy. A doctrine leading to such consequences never can be tolerated.

By the acceptance of the abandonment, each underwriter must be deemed interested, individually, and not as a partner, in the proportion which his subscription bears to the value of the subject. Neither can the writing, appointing a common agent to manage the subject, have the effect of making the underwriters copartners. It is not uncommon for different persons to appoint the same agent to transact their business; but it would be a strange conclusion to say, that the principals thereby became joint-partners. In these cases, as well as in the one before us, the common agent must be considered as representing, separately, the rights of each individual, according to his interest in the subject. I think, therefore, that the defendants are not to be considered joint-partners with the other underwriters, and that the action is maintainable against them, in the present form.

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*The next question is, as to what extent they are responsible. Ship-owners are, undoubtedly, personally responsible for necessities furnished the master, in the course of the voyage. The supplies, however, must be reasonable, fit, and proper for the occasion. For the security of ship-owners, against being improperly charged by the master, it devolves on the creditor to show that his advances were for necessities, because it does

not fall within the scope of the master's authority, or within the trust and duty of his station, to pledge the credit of owners for any other purpose.

The right of the master, *quasi* master, to appropriate the cargo for the purpose of repairs, was, I think, at an end, on the arrival of the ship at her port of destination. The cargo then became subject to the control of the consignees, and the master must, if deficient in funds, resort to other sources for necessities. In the present case, however, he, together with *Steele & Thompson*, were consignees of the cargo, and, as such, were agents for the plaintiffs, who, by the abandonment and acceptance, became owners of the cargo. The plaintiffs' agents, then, appropriated the proceeds of the cargo for repairs and expenses on the ship; and though this might have been unauthorized by the plaintiffs, and they might have looked to their agents for compensation, yet there is nothing to prevent their ratifying the acts of their agents, and thereby making the advances their own, which they have done by bringing the present action. The responsibility of the ship-owners must, however, be restricted to advances for necessary repairs and expenses, to prosecute the voyage originally contemplated. They have done nothing to ratify the expenses of the master, at *Kingston*, in arming the ship in the manner he did. None of the letters written by the Messrs. *Rhinelanders*, or *Hartshorne*, approving the conduct of the master, appear to have been written after they were apprized of what course he had pursued at *Kingston*. They had a right to presume he was prosecuting the voyage, according to his original instructions, which were very precise and definite. In violation of which, the master, at *Kingston*, fitted out his vessel as *an armed ship; put on board 16 guns, and 22 additional seamen, and went to the enormous expense of upwards of 17,000 dollars, which was more than the ship was valued at, in the policy. Such part of the expenses as related to this armament were, I think, unauthorized. There is nothing in the case to show that any circumstances had occurred rendering it necessary to arm; and it certainly was not in contemplation of the original ship-owners, if we may judge from their instructions to the master. These expenses must, therefore, be rejected. The result of my opinion is, that the underwriters on the ship are answerable for all repairs and expenses which were necessary to refit the ship, so as to enable her, as a merchant vessel, to prosecute the original voyage; and that the defendants are liable in this action, for the proportion thereof, in the same *ratio* as their interest in the ship bears to the proceeds of the cargo, applied to that object, which must be adjusted by the parties, or referred to some proper person for the purpose.

LIVINGSTON, J. If underwriters accept a vessel, it is reasonable that she should pass into their hands, *cum onere*, and that

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they should be liable for proper repairs in a foreign port, after the disaster which occasioned them, and subsequent to abandonment. Nor can it make any difference, whether an abandonment be immediately followed by acceptance or not. The party ultimately benefited by the repairs should pay for them. The underwriters were entitled to the freight earned after abandonment, and we must now suppose that, without repairing, she was in no condition to have earned any. The captain, being the agent of the assured, might have borrowed money of the plaintiffs to repair, and if he has taken it of his own accord, or from the consignees of the cargo, it can make no difference, if they choose to affirm his acts, and the moneys have been properly expended.

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My greatest difficulty has been, to define the extent of the defendants' responsibility; that is, whether they be liable as joint-partners, with the other underwriters, or only in proportion to their subscription. The case is admitted *to be new; at least no decision on the point can be found. We are, then, at liberty to adopt a rule, which we think best adapted to do complete justice between the parties. That owners of vessels are liable, as other joint-partners, is not denied; but then, as in other cases, it ought to be a partnership of mutual consent, and the world should credit them as such; but where a vessel, during a voyage, is thrown upon its insurers, who take it only for the purpose of diminishing a loss, and with no other view than to sell her, at its termination, it is carrying the general principle too far, to consider them in the light of common partners; nor is it necessary for the security of third persons that they should be thus regarded. When moneys are advanced in a foreign port, for repairing a vessel, it is on the credit of the owner who sent her to sea, or of the captain, or of the vessel itself, or of all, and not on that of the underwriters, who are altogether unknown abroad. In this case, the moneys were advanced partly on the credit of the Messrs. *Rhinelanders*, and partly on *bottomry*, and there can be but little doubt that, if ignorant of the abandonment at the time of the advance, the lender might recover against them, who would have their remedy over against the underwriters, if it turned out that the repairs were made after abandonment. In the latter case, the underwriters would be responsible, according to their contract, that is, in proportion to their respective subscriptions; for the suit would then be between the immediate parties to the policy; why, then, if the lender chooses, in the first instance, to resort to them, and not to the former owner, should the nature and extent of their liability be different? It is of little weight to say, that assurers are not obliged to accept of a vessel; such acceptance is, generally, an act of necessity; it is the only means left to indemnify them, in some degree, for a total loss and even this indemnity they will be deprived of, if it exposes them to the consequences of a partnership liability.

In voluntary partnerships, each one has a choice of his associates; but if a case like the present be governed by the rules of common partnerships, a man of property, whether *he pleases or not, may find himself a partner with others who may all be insolvent. An underwriter, after subscribing a policy, has no control over it. The assured presents it to whom he pleases, and precludes all possibility of choice, as to his other partners; no prudent man, on these terms, would continue an assurer.

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The extreme injustice of making a solvent pay for a bankrupt underwriter, where such liability is not explicitly understood, in the first instance, is too evident to require illustration. It is an inconvenience, against which the policy itself has guarded, nor has such responsibility ever before been insisted on. Why should a man, who subscribes a policy for only 100 dollars, without any view to purchase, pay, not only his own proportion of repairs, but also that of some adventurer, or gambler, who may have underwrote 10,000 dollars, after him, on the same risk, and who, at the very time was, perhaps, not worth a shilling? If, voluntarily, he had associated with such a man in the purchase, there would no longer be any hardship, because, knowing the law, he was apprized of the risk he ran, and was willing to meet it. "It is not enough," says *Watson*, (*Law of Partnership*, p. 5.) "to form a partnership, that two or more persons hold any thing in common, such as *legacies*, *donees*, or *purchasers* of the same thing, for this, not implying the *reciprocal choice* of the parties, cannot link them together in partnership. All the parties ought, reciprocally, to choose and approve of one another, in order to form among themselves that sort of tie which is a kind of brotherhood;" *societas jus quodammodo fraternitatis in se habet*. I concur, therefore, in the opinion just delivered.

KENT, Ch. J. By the accepted abandonment, the defendants became part owners of the ship, and this ownership is to be computed from the time of the loss. Abandonment has this retrospective effect; and it amounts to a complete transfer of the property. (2 *Caines*, 284. *United Insurance Company v. Robinson and Hartshorne*. 2 *Emerigon*, 194—196. *Pothier*, *Contrat d'Assurance*, n. 138.) Whether the practice be to execute an *assignment* also, I do not know, though it seems not to have been done in the case of *Leatham v. Terry*, (3 *Bos. & Pull*. 479.) until the underwriters themselves, afterwards, *sold the ship. The very essence of abandonment consists in a cession of the property; and being in writing, and accepted, the insurers are to be considered as the legal owners; as they, afterwards, acted upon that cession, and took charge of the ship, they are, at least, concluded from contesting the question of ownership in the present suit.

The next question is, how far they are liable, as owners, for

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the acts of the master while at *Jamaica*. The master, in a case of necessity, may sell a part, or hypothecate the whole, of the cargo, pending the voyage; and for such sale the owner of the vessel will be responsible. But the present is not such a case, for the cargo had arrived, and, except the small part appropriated at *Porto Rico*, was delivered at *Jamaica*, its place of destination. The voyage, as to the cargo, had ended, and the master's authority over it, in his character of master, was gone. The cargo was, in judgment of law, in possession of the consignees, of whom the master was one. The sale of the cargo, afterwards, and the appropriation of the proceeds to the repairs and armament of the ship, were made by the captain, and Messrs. *Steele & Thompson*, as joint consignees; and no doubt they were responsible over to the plaintiffs for this appropriation, as for a breach of trust. But the master had authority to borrow money at *Kingston* for the necessary repairs of the ship, and the owners would have been bound to refund such loan. The question is, whether the plaintiffs, as owners of the cargo, may not affirm the act of their consignees, and call upon the owners of the vessel for the amount of such appropriation, in like manner as if they had themselves advanced the money, in the first instance? A subsequent ratification is equal to an original mandate; (*Ratihabitio mandato comparatur*. Dig. lib. 46. tit. 3. l. 12. § 46.) and I incline to think the plaintiffs have a right of action, equally as if the proceeds of the cargo had, by their order, been applied to the repairs of the ship.

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The third point that arises in this case is, how far the repairs made at *Jamaica* were necessary, under the circumstances in which the vessel was placed. On this *point, I have no hesitation to exclude from the item of necessities, the whole expenditure of arming the ship. There are no facts stated in the case, from which we can infer the necessity of doing it at *Jamaica*, and, not in the first instance, at *New-York*. The arming of the ship changed her character, and was calculated to affect her destiny; and unless the necessity was palpable and pressing, such an expenditure ought not to be allowed.

Deducting that part of the expense, and suffering the other charges to be admissible, the last question is, How far are the defendants responsible, in consequence of their share in the ship? They insured separately; and the abandonment was made to them separately, because it was made in the capacity in which they stood as insurers. They became owners of an aliquot part, in the ratio which their separate subscription bore to the whole sum insured; and it required a special agreement between the several insurers to change their separate character and make them joint partners, and security for each other. Nothing can be more plain and reasonable, than that the character in which they started should continue, until changed by their act and consent. No such act appears in the present

case. They accepted the abandonment in the capacity in which they stood as insurers. Their responsibility as owners was as distinct as their responsibility as insurers. Their uniting in a letter to Mr. *Hartshorne* is no evidence of copartnership, or that they meant to engage for each other. They united only in making the same person agent for all. To make separate underwriters responsible for each other, and to adjudge them partners, by mere operation of law, and in consequence of an abandonment which could not be resisted, would be destructive of that species of insurance. It would be manifestly unjust, for no person ought to be bound, without his knowledge and assent. There is no color for an inference of that assent, in the present case.

In the case of *Hoare v. Dawes*, (*Doug.* 371.) a broker was employed by a number of persons to purchase a lot of tea, of which *each were to have their separate shares, and he made the purchase. It was held that they were not partners in the purchase, because there was no undertaking by one to advance money for another, nor any agreement to share with one another in the profit or loss. Lord *Mansfield* observed, that it would be most dangerous, if the credit of a person who engages for a fortieth part, for instance, should be considered as bound for all the other parts. So, in the case of *Coope and others v. Eyre and others*, (1 *H. Black.* 37.) several persons entered into an agreement to purchase a quantity of oil, in the name of A. only, and to take *aliquot* shares of the purchase; but as it did not appear that they were *jointly* to resell the goods, they were held not to be partners. There was no *community* between them, as to profit or loss. Each party was to have a distinct share, and to manage it according to his discretion. The principle contained in these cases was adopted by this court in the case of *Holmes v. The United Insurance Company*, (*July* term, 1801,)(a) and they are applicable to the point before us. The true rule was applied by the Court of Chancery in the case of *Speering v. De Grave*, (2 *Vern.* 643.) where it was decreed that for appropriations by the master to the necessary wants of the ship, the owners should pay in proportion to their respective shares and interests in the ship.

The result of my opinion, accordingly, is, that the plaintiffs are entitled to receive from the defendants a proportion of the proceeds of the cargo applied to the refitting of the ship at *Kingston*, but not for what was applied towards arming the said ship, or increasing her complement of men; and that such proportion is to be the same between the sum they are to pay and the whole sum so applied, as there was between the sum the defendants subscribed and the whole amount of the subscription.

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(a) Since reported. See 2 *Johns. Cas.* 329.

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SPENCER, J., and TOMPKINS, J., concurred in the opinions delivered by the other judges.

Judgment for the plaintiffs, *ut supra*.

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*BIRD, SAVAGE and BIRD *against* PIERPOINT.

Two of three partners became bankrupts in England, the other residing in this country, was declared a bankrupt under the law of the U.S. An action of *assumpsit* was brought in the names of all the partners to recover a debt due before the bankruptcy. Ought not the assignees of the bankrupt-partner to have been made parties to the suit? *Quære*, if the assignees of the bankrupt-partner in England can sue here? The bankruptcy of the plaintiffs may be given in evidence under the general issue. *Quære*. (a)

(a) See *Abraham v. Platore*, 3 *Feed. Rep.* 538, and the cases there cited.

THIS was an action of *assumpsit*, for goods sold and delivered. Plea, *non assumpsit*. The cause was tried before Mr. Justice Livingston, at the *New-York Sittings*, on the 14th January, 1805. On the trial, the plaintiffs proved their account for the goods sold, and there rested the cause. The defendant then offered to prove that the plaintiffs were joint partners in trade in England, under the firm of *Bird, Savage and Bird*, and in this country, under the firm of *Robert Bird & Co.*, and that prior to the commencement of the present suit, *Henry M. Bird* and *Benjamin Savage*, two of the partners, were duly declared bankrupts in *Great Britain*, where they resided, and that their property had been assigned, pursuant to the laws of that country; that *Robert Bird*, the other partner, prior to this action, was declared a bankrupt in this state, according to the bankrupt act of the *United States*, and that his property was duly assigned in conformity to the act. This evidence was overruled by the judge.

The defendant then offered to prove, that previous to the commencement of this action, and before the plaintiffs were severally declared bankrupts, they did, on the 3d day of *December*, 1802, make an assignment of part of their property to *R. Harison*, in trust, for certain of their creditors; and the counsel for the plaintiffs were, at the same time, called on to say, whether the present suit was prosecuted for the benefit of the said assignee, to which they declined making any reply. The evidence was also overruled, and a verdict was found for the plaintiffs.

A motion was made, in behalf of the defendant, to set aside the verdict, for the misdirection of the judge. The case was argued, at the last term, by *Benson* and *Radcliff*, for the plaintiffs, and *Riggs* and *Harison*, (*Hoffman* on the same side,) for the defendants.

The court being divided, the judges now delivered their opinions, *seriatim*.

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*SPENCER, J. The only question which can arise in this case, is, whether the plaintiffs are proper parties to maintain the suit. As it respects the assignment to Mr. *Harison*, independently of its not being a defence at law to the defendant,

it is special in its nature, and does not transfer this debt. In regard to *Henry M. Bird & Savage*, their discharge in *England* cannot be taken notice of here; the case of *Van Raugh v. Van Arsdaln* (3 *Caines*, 154.) is decisive that this court will not suffer the discharge of an insolvent, under the laws of a state where he is domiciled, to operate against a creditor who resides without that state, and whose debt was contracted elsewhere. If we will not take notice of the act of insolvency, under such circumstances, in favor of the insolvent, whose whole property has been divested to satisfy his creditors, surely we cannot notice the bankruptcy in *England*, to defeat the recovery of a debt indisputably just. The courts of chancery (1 *H. Black.* 131. in notes. *Solomons v. Ross. Jollet v. Deponthieu. Neal v. Cottingham*) in *England* have, it is true, recognized the assignees or curators of a bankrupt's estate, which was assigned abroad; but it was solely on the principle that the assignment was for a valuable consideration, and therefore, it was not that the foreign bankruptcy, as such, had any operation beyond the country where it occurred. It remains to inquire what effect the bankruptcy of *Robert Bird* has upon the question. The defendant's counsel insists that his assignees ought to be joined in the action instead of him, his legal rights having been vested in them. If this was a case of a bankrupt without partners, the objection, I incline to think, would be conclusive; but the partners abroad, of whose bankruptcy we can take no notice, have a right to the partnership fund, to discharge the debts due from them, without the embarrassments and restraints which the uniting the names of the assignees of one of the partners might impose.

I have met with no case but that of *Eckhardt v. Wilson*, (8 *Term Rep.* 140.) which requires the assignees of a bankrupt to be joined. That is a very recent case, and not authoritative here; but besides this, the bankruptcy was pleaded in bar, and it did not operate as a surprise on the plaintiffs. I do *not, however, rest my opinion on the form of the pleading, but on the necessity, convenience, and intrinsic propriety of suffering the solvent partners to collect the debts of the firm. I lay great stress on the circumstance, that this is not a controversy between the partners in *England* and the assignees of *Robert Bird*; but is a mere evasion and shift of an acknowledged debtor, to turn his creditors round. The cases of *Silk v. Osborn*, and *Evans v. Brown*,† proceeded on the principle, that however the question might be between the bankrupt and his assignees, that it did not lie in the mouth of a third person to set up this defence. In my opinion the plaintiffs are entitled to the *postea*.

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† 1 *Esp. Rep.*
140, 170. In
these cases the
plaintiffs were
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bankrupts

THOMPSON, J. The questions, presented for the consideration of the court, are, whether, admitting the truth of what was offered to be proved, there are proper parties on the record;

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and, if not, whether advantage can be taken of it under the plea of *non assumpsit*.

Our bankrupt law declares, that after the assignment, neither the bankrupt nor his trustees shall have power to recover or discharge any debts, which pass by the assignment; but the assignee shall have such remedy to recover the same, in his own name, as such bankrupt might have done, if no commission had issued. It is not pretended but that the demand for which the present action is brought, originated before the bankruptcy, and passed by the assignment, which must, under the statute, vest in the assignees a legal right. The statute goes far towards negating the power of the assignees to use the bankrupt's name, in actions for demands which passed by the assignment; it says, that neither the bankrupt, nor his trustees, shall have power to recover or discharge such debts. Perhaps, however, this may be understood to mean, that they shall not have power to do this, so as to *enure* to the benefit of the bankrupt. But there can be no good reason why the assignees should not prosecute in their own names.

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The construction given to the *English* bankrupt law, which, in this respect, is analogous to ours, is, that the name of the bankrupt cannot be legally used in a suit after *his* bankruptcy, to recover a demand which passed by the assignment. Thus, in an action by *assumpsit* by several partners, the defendant pleaded in bar the bankruptcy of one of them, and the plea was held good. (*Eckhardt v. Wilson*, 8 Term Rep. 140.) The court said the plea showed not merely, that there were other persons (namely, the assignees of the bankrupt partner) who ought to have sued with the plaintiff, but that one of the plaintiffs could not sue at all. This case also shows that the assignees of a bankrupt partner may be joined in the same suit with the other partners. And it has also been held in the *English* courts, (*Hancock v. Haywood*, 3 Term Rep. 433.) that the assignees of partners, against whom separate commissions of bankruptcy have issued, may be joined in the same suit, to recover a debt due to the bankrupts jointly. Perhaps, we ought not so far to take notice of foreign bankruptcies, as to compel prosecutions to be carried on here in the name of the assignees; yet I think we ought to recognize the rights of the assignees, so far as to allow them to prosecute in their own names, if they please. (*Smith v. Buchanan*, 1 East, 11.) But whatever may be the proper course of proceeding, with respect to foreign bankruptcies, we are bound to take notice of bankruptcies happening here, and the assignees of *Robert Bird* ought to have been joined either with his copartners or their assignees.

In the case of *Evans & others v. Mann*, (Cowp. 570.) the court laid it down as a general rule, that where the assignees bring an action, on a contract made by the bankrupt before his bankruptcy, they must state themselves to be assignees

There may be cases, where the assignees have been permitted to prosecute in the name of the bankrupt; but I apprehend it has been allowed in no case, except upon contracts made by the bankrupt, after his bankruptcy, and before he obtained his certificate. When the assignees are appointed, all the estate and effects of the bankrupt are vested in them; and he is incapable of carrying on trade, or contracting for his own benefit, until he has obtained his certificate. All the estate acquired by him, or contracts made between these two periods, are to *enure* to the benefit of *his creditors, and are vested in his assignees; (1 *Atk.* 252. *Ex parte Proudfoot*. *Cowp.* 824. *Martin v. O'Hara*. *Bankrupt Law*, s. 50.) except, perhaps, that which may be the fruits of the personal labor of the bankrupt. (1 *Espinasse's Cases*, 140. 170.) And though the assignees might, undoubtedly, prosecute suits in their own names, on contracts thus made by an uncertificated bankrupt; yet they may also use the name of the bankrupt, because, by operation of law, he is considered their agent. (*Cowp.* 570. *Evans v. Mann*. 7 *Term Rep.* 296. *Webb v. Ward*.)

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It remains only to inquire whether this defect of parties can be taken advantage of upon the trial, under the plea of *non assumpsit*. I understand the general rule to be, that for defect of parties plaintiffs, advantage may be taken of it upon the trial, but the want of proper parties defendants, must be pleaded. (*Scott v. Godwin*, *Barnard v. Kenworthy*, 1 *Bos. & Pull.* 73. note.) The reason of the rule is obvious. Plaintiffs are presumed to know their own rights, and all the persons interested in the subject of prosecution, and, therefore, cannot be surprised by the inquiry. It is not so with respect to defendants. There may be secret partners unknown to the plaintiffs; and if the defendants take advantage of this, they must plead it, and thereby furnish the plaintiffs with proper parties, to prevent surprise. Thus, in the case of *Graham & others v. Robertson*, (2 *Term Rep.* 282.) *Buller*, J. nonsuited the plaintiffs, because, from the evidence, it appeared, that they had not united with them all parties interested, which nonsuit, on a motion to set it aside, was ruled to have been properly granted. This rule has been too long settled to be now shaken. (2 *Stra.* 820. *Buller's N. P.* 152.) And in the case of *Hopkins v. Dewar*, (*Buller*, 153.) in an action of *assumpsit* for work, labor and services, proof that the plaintiff was a bankrupt, at the time of the work and labor done, was held sufficient to nonsuit him.

I am, therefore, of opinion, that proof of the bankruptcy of *Robert Bird*, at least, ought to be received, and that a new trial must be awarded, with costs to abide the event of the suit.

*LIVINGSTON, J. The first question which occurs is, whether the assignees of *Henry M. Bird* and *Benjamin Savage* should

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have been parties. I have ever been disposed to take notice of assignments under the bankrupt laws of other countries, to sustain suits on them, and to consider the bankrupt discharged from all his creditors, wherever they be; but since our decision in *Van Raugh v. Van Arsdaln*, (3 *Caines*, 154.) they must be regarded as *voluntary* transfers, which cannot have the effect of enabling assignees to sue in their own names, for a *chose in action*. It would be inconsistent to allow creditors residing here to sue the bankrupt in our courts, and at the same time permit the assignee to recover his property in this country. It would be holding him liable, and at the same time incapacitating him from paying. But if these assignees were not necessary parties, it is said those of *Robert Bird* were. This presupposes a right in them to intermeddle with the collection of debts due to the firm; but no such right exists. It is well settled, that a joint estate must be first applied to payment of demands on it; and that separate creditors of the several partners can only claim the surplus belonging to each, after all claims on the joint fund are satisfied.

It may be doubted, whether *Robert Bird's* assignees can discharge a debt due to the partnership. Why then make them plaintiffs, which might only give them a right to receive the sum in controversy, to the prejudice of the other partners, and of general creditors? If the only pretensions, which *Robert Bird's* assignees have, is to call upon the house of which he was a partner, for his proportion of the joint estate, after satisfaction of their creditors, his right to sue for such estate, in conjunction with his partners, cannot be divested. It is better that joint debts, notwithstanding the bankruptcy of one partner, should be collected in the ordinary way, as if no misfortune had intervened, than to introduce considerable confusion on the record, by taking notice of it. If there be precedents of declarations in this form, (for the one in *Hancock v. Haywood*, (3 *Term Rep.* 433.) which was cited, is not in point,) they are very rare; *and nothing short of an adjudged case would convince me of the necessity of it. It is one thing for such declarations (although I much doubt whether any are to be found) to pass *sub silentio*, and another to say that such a form only is good. The assignment to Mr. *Harison* was also properly rejected, not because it was fraudulent, for its object is fair and laudable; but because, being voluntary, it could not vary the mode of suing at common law, or defeat an action brought in the names of the present plaintiffs.

But if mistaken in all these points, the verdict ought not to be disturbed, because, if any of the matters relied on, were sufficient to bar, or abate the action, they ought to have been pleaded. Courts have already gone far enough in admitting special matter to be given in evidence under the general issue, in matters of *assumpsit*. No one reason can be given, why a plaintiff in such suit is not entitled to be apprized of his ad

versary's defence, as well as in any other. In actions on promissory notes, when the payee is not plaintiff, it should emphatically be necessary to plead or give notice of every defence; for, as the law is now supposed to be, innocent endorsees of such paper are every day surprised by evidence of usury, or other matter, of which they cannot have any knowledge, and, of course, must be unprepared to meet it. The inconvenience of this indulgence is so palpable, that nothing should induce us, notwithstanding the general expressions we sometimes meet with, to extend the rule, so as to embrace a single defence, not already decided on, as proper under *non assumpsit*. Nor is this case within the general rule, as laid down by Lord Chief Baron Gilbert. "On this issue," says he, "every thing may be given in evidence which disaffirms the contract, for that goes to the *gist* of the action, since, if there be no contract to be performed, at the commencement of the action, there could be no trespass for the non-performance of it, and therefore, a release goes to the *gist* of this action, for it shows there was no contract at the time the action was commenced; so every thing which shows the contract *to be *void*, as nonage, or more money lost at play than the statute allows, may be given in evidence on the general issue; for on a *void* contract, the plaintiff has no right of action, therefore this and the like go to the *gist* of the action. Whatever goes to show there was no contract, or that it was performed, or paid, or released, or that there was no consideration, and discharged, goes to the *gist* of the action, and need not be pleaded." Without indulging the presumption of examining the reasons assigned by this great man for the law as laid down by him, it is certain the present case is not embraced by this rule, and still less by the reasons of it.

The defence here, so far from establishing that there was no contract, or that it was *performed*, or *released*, or *paid*, or from having any thing to do with the *gist* of the action, admitted the *assumpsit*, and that it is in full force and unperformed, only advancing a collateral matter, which was to have no other effect than to turn the plaintiffs round. It is no argument to say that this matter, resting in the plaintiffs' knowledge, they were bound to take notice of it. The answer is, that they were not obliged to be ready to repel any defence which they were not apprized *would be set up*. Notwithstanding the bankruptcy of all the parties, they might, by some matter *ex post facto* their discharge, have shown that a right to sue revested in them, or as was done in *Winch v. Seely*, (1 Term Rep. 619.) that this debt did not pass under the commission. It is not like the case, therefore, of a person suing when he must know either that no cause of action *ever* existed, or that it was absolutely *done away*, before this suit was commenced. It comports perfectly with the rule of Baron Gilbert, to say, that whatever does not deny a *right of action*, or go to

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the gist of it, but only alleges that the plaintiffs have parted with their right, or that it had been *transferred* by law to others, ought always to be pleaded. This imposes no hardship on defendants, and if they do not choose to resort to special pleading, they have no excuse, since the "act for the amendment of the law," for not subjoining to the general issue, a notice of what they intend to rely on.

There is a case, I admit, (*Eckhardt v. Wilson*, 8 Term Rep. 140.) which goes the full length of deciding, that the assignees of a bankrupt should be joined with his solvent partners; but besides that this case is no authority here, it is so contrary to the spirit of several other *English* adjudications, that it is impossible to reconcile the one with the others. In *Fowler v. Down*, (1 Bos. & Pull. 45.) the bankrupt was not only permitted to sue in his own name, but the whole court adopted this principle, which is too reasonable not to receive every one's assent, that if the assignees do not dispute the bankrupt's right to sue, third persons, and those who have contracted with him, shall not; and Justice *Rooke* adopts, as a mode of preventing any liability to the assignees in a subsequent action, the giving them notice of the pending suit, that they may take such measures as they may think proper. Lord *Kenyon*, in *Silk v. Osborn*, (1 Esp. Rep. 140.) says nearly the same thing, that, "however the question might be between the bankrupt and his assignees, it did not lie in the mouths of third persons to set up the plaintiff's bankruptcy as a defence." In *Evans v. Brown*, (1 Esp. Rep. 170.) his lordship not only permitted a bankrupt to maintain a suit for money lent; but says expressly, that if it did belong to the assignees, when recovered, about which there was some dispute, he would not permit the bankruptcy to be set up in bar. All these decisions appear to proceed on this principle, that the party by his contract is estopped to dispute the bankrupt's right to sue. Leaving to others to reconcile the inconsistency of the decision in *Eckhardt v. Wilson*, with other cases here mentioned, I shall only observe, that in that, and in most other cases where the party intended to rely on the plaintiff's bankruptcy, it was done by pleading. The replications in *Eckhardt v. Wilson*, and in *Winch v. Sheely*, show the propriety, nay, absolute necessity, of pleading this matter, or of giving notice of it with the general issue. On every ground, therefore, a new trial must be denied.

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*KENT, Ch. J. The question in this cause is, whether the suit was brought by the proper parties; and if not, then, whether the defendant could avail himself of that defect upon the trial under the plea of the general issue.

The late act of bankruptcy (*L. U. S.* 6th Cong. sess. 1. c. 19. s. 13.) declared, that after the assignment the bankrupt should not have power to sue for his debts, but that the assignees should sue *in their own names*; and there is the same rule under

the *English* system. (*Evans v. Mann*, *Cowp.* 570.) It was, accordingly, held and ruled in the case of *Eckhardt and others v. Wilson*, (8 *Term Rep.* 140.) that to an action of *assumpsit* by several plaintiffs, it was a good plea in bar, that one of the plaintiffs had become bankrupt, and duly assigned his debts and effects, because it showed that one of the plaintiffs could not sue at all, and that there were other persons, viz. the assignees of the bankrupt partner, *who ought to have sued with the plaintiffs*. The same point was held by *Ashhurst, J.*, in the case of *Graham v. Robertson*, (2 *Term Rep.* 284.) where he observed, that if the money for which the plaintiff sued, as being advanced by him, was paid on a partnership account, the other partners who had become bankrupts, or *their assignees*, ought to have joined in the suit. I conclude, from the words of our statute, and these expositions of the *English* statutes, which are similar, that *Robert Bird* was improperly made a plaintiff in this suit, and that instead of him, his assignees ought to have been joined.

It is also a question, whether the assignees of the two *English* bankrupts ought not to have brought the suit in their own names, instead of the names of the bankrupts. It is not essential at present to determine this point, since we perceive that there is one improper person made a party; but in the case of *Smith v. Buchanan*, (1 *East*, 11.) Lord *Kenyon* said, that they did permit assignees of bankrupts, abroad, deriving titles under foreign ordinances, to sue there for debts due to the bankrupt's estate, and that this permission was on the ground, that the right to personal property must be governed by the laws of the country *where the owner was domiciled. It is not, indeed, expressly said, though I think it is necessarily to be implied, that such suits were permitted to be brought *in the name* of the assignee, as that would seem to follow a recognition of his right.

It was considered, upon the argument, as leading to confusion and difficulty, to permit assignees under separate and distinct commissions, to unite in one suit. But so long as the suit is for a *joint debt* due to the several bankrupts whom the assignees represent in their *joint* capacity, I see no objection. Assignees under separate commissions united in the case of *Hancock v. Haywood*, (3 *Term Rep.* 433.) and the court said, the suit was proper, so far as the demand was for the joint debts due to both the bankrupts.

It was also suggested, on the argument, that separate partners could not separately be declared bankrupts, as to their partnership concerns, but I apprehend the rule to be otherwise. In the case of *Crispe v. Perritt*, (*Willes's Rep.* 467.)† the Court of C. B. decided, after much consideration, that a separate commission might be taken out against one partner upon the petition of a joint creditor. It was also the opinion of the court, in that case, that the words *creditors* and *debts*, in the

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bankrupt laws, comprehended both separate and partnership debts, and that the certificate was a discharge, both from the partnership and separate debts, because a partnership creditor may, if he pleases, come in under a separate commission.

The next question is, whether the defendant may avail himself, at the trial, of the want of proper parties.

In the case of *Graham v. Robertson*, above-mentioned, it was agreed that the want of proper parties was good ground for a nonsuit at the trial. The rule is considered as well settled, that in an action of *assumpsit*, if all the parties who ought to join are not made plaintiffs, the defendant may take advantage of it, on *non assumpsit*. Serjeant *Williams*, in one of his learned notes to *Saunders*, (1 *Saund.* 291. *f. g.*) questions the good sense of the rule, while he admits it to be established. But the present case is much stronger than that of the want of an additional plaintiff; for *here is one, at least, of the plaintiffs, prohibited from bringing the suit; and where one is joined who ought not to be joined, it was decided in the case of *Eckhardt v. Wilson*, to be an objection pleadable *in bar*; and, generally, whatever will form a good plea *in bar*, may be given in evidence, under *non assumpsit*. I am, therefore, of opinion, that the evidence of the bankruptcy of the plaintiffs, prior to the commencement of the suit, ought to have been received, and that the verdict must, accordingly, be set aside.

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TOMPKINS, J., having been an assignee of one of the plaintiffs, gave no opinion.

The other judges being equally divided in opinion, the defendant took nothing by his motion.

Judgment for the plaintiffs. (a)

(a) See S. C. 2 *Johns. Rep.* 342. 10 *East*, 418. *Thomason and others v. Frere*.

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In an action of *assumpsit*, for a fraud in the sale of cotton, it was held that the declaration should contain either an express warranty, or an allegation that the vendor *knew* of the bad quality of the article, at

THIS was an action of *assumpsit*. The declaration contained five counts. The *first* count stated, that whereas the defendant, in consideration that the plaintiff would buy of the defendant, at his special instance and request, a quantity of cotton, to wit, 67 bales and 2 bags, weighing, &c., at a certain price *per pound*, to be paid, &c., the defendant, "then and there undertook, and faithfully promised the said *Robert Perry* that the said cotton, and every part thereof, was good merchantable cotton, and fairly packed, bound, and put up in the

said bales and bags, and was equal in quality to a certain parcel then and there produced and shown as a sample thereof." It then avers, that the plaintiff, confiding, &c., did buy the cotton for the price mentioned, and paid the defendant for the same; but that the defendant, not regarding his promise, &c., did craftily and subtly deceive the plaintiff in this, "that a great part of the said cotton, to wit, 16 bales, was then and there deceitfully and fraudulently packed, bound and tied up, and in an unmerchantable state, and the middle or inside of divers, to wit, the said 16 bales, was not good or merchantable *cotton, but was then and there dirty and unmerchantable, and of a very inferior quality," &c.

The *second* count stated, that in consideration the plaintiff had bought of the defendant the like quantity of cotton, at the same price, &c., the defendant "undertook, that the said cotton was merchantable, packed up," &c., as in the first count. Yet the said defendant, not regarding, &c., but contriving and fraudulently intending to injure the plaintiff, deceived him in this, that 16 bales of the cotton were not merchantable, packed up fairly, &c., but was unmerchantable and of an inferior quality, &c.

The *third* count stated, that in consideration that the plaintiff had undertaken and promised to pay the defendant 7,021 dollars and 60 cents, when requested, &c., the defendant undertook and promised to deliver to the plaintiff, 67 bales and 2 bags of good merchantable cotton, of the value of 7,021 dollars and 60 cents, when requested, &c. Yet the defendant did not deliver the same, &c., but instead thereof, "did deceitfully and fraudulently deliver to the plaintiff, 67 bales and 2 bags of base, unmerchantable cotton, of a very inferior quality, and of small value, to wit, of the value of 10 dollars, contrary," &c. The *fourth* count was for money paid, laid out, &c., and the *fifth* for money had and received to the use of the plaintiff. Plea, the general issue.

The cause was tried at the *New-York Sittings*, the 18th December, 1804, before Mr. Justice *Livingston*. On the trial, it appeared in evidence, that the defendant sold the cotton in question, as being in the public store on *Staten Island*, where it had been deposited when imported, on its arrival from *New-Orleans*. The defendant produced a sample, and "on being asked by the plaintiff if he might depend on the quality of the cotton being like the sample, the defendant answered, he would warrant the whole to be of the same quality and of equal goodness with the sample." A short time after the purchase was concluded, the plaintiff sent his clerk to examine the cotton, taking with him the sample which had been produced to the plaintiff; on examining the bales, without *opening them, so as to inspect the inside, the whole appeared to be as good as the sample, and in the same state as when it was imported.

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the time he sold it as merchantable; and that the proofs at the trial must correspond with the allegations in the declaration. (a)

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(a) See *Onida Man. Society v. Lawrence*, 4 Conn. Rep. 443. *Scott v. Colgate*, 30 Johns. Rep. 196, and the case cited.

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The bill of parcels was produced, which contained no warranty. The cotton was exported to *Liverpool*, in *England* where it was delivered in the same state as when it was taken on board of the ship, except a small portion which received some sea damage. The consignees of the shippers sold the cotton to certain dealers in that article, for a full price, but without any warranty. On opening the bales, considerable quantities of dirt and cotton seed were found in the inside, the purchasers then demanded of the consignees compensation for the damage in consequence of the cotton being falsely packed. The question of damage was voluntarily referred to arbitrators, mutually chosen by the consignees, and the purchasers of the cotton, who, after examining the cotton, &c., awarded 187*l.* 4*s.* 11*d.* sterling to be allowed by the consignees for a compensation to the purchasers; and the consignees accordingly allowed and paid the same, and the expenses attending the arbitration, being 31*l.* 0*s.* 5*d.* sterling, which sums, with interest, the plaintiff claimed in damages from the defendant.

The defendant's counsel moved for a nonsuit, on the same grounds on which it was now argued before the court. The judge directed the jury, to confine their attention to the third count in the declaration, and the proofs in support of it, and observed that the plaintiff was not entitled to recover, unless the defendant had been guilty of a fraud, in selling the cotton as good, knowing at the same time that it was not so; and that there was no evidence, in his opinion, to warrant this conclusion; that if the plaintiff was entitled to recover, there was no proof of damage, as the sale in *England* was so made as not to entitle the purchaser to claim damages of the consignees; and that the damages he paid, were in consequence of his voluntary act, in submitting it to arbitration, for which the defendant could not be answerable in law. The jury found a verdict for the plaintiff, for 827 dollars and 76 cents. On being asked by the court, on what grounds they found the verdict, they answered, *on the warranty charged in the first count of the declaration, being of opinion that no fraud was to be imputed to the defendant in the sale of the cotton.

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Riggs, for the defendant, contended, that the verdict ought to be set aside, and a judgment of nonsuit entered. 1. The jury deliberated and decided on what was not submitted to their consideration. The judge who tried the cause, directed them to confine their inquiry to the third count in the declaration, in which the plaintiff alleged a fraud in the sale; yet the jury found a verdict, on the ground of a warranty contained in the first count.

2. If there is no warranty, and the plaintiff meant to recover on the ground of fraud, then he should have alleged and proved a *knowledge* in the defendant, of the bad quality or

condition of the cotton. When the plaintiff declares in *assumpsit* on an implied warranty, he must allege that the party knew the defect at the time. The *scienter* is of the essence of the action; and as it was not alleged in the declaration, there was no cause of action, and it ought not to have been referred to the jury. He was then proceeding to cite some authorities, (a) but the court observed, that there could be no doubt as to the law.

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3. The declaration does not allege a *warranty*, nor does it contain any words which amount to one. Where the plaintiff intends to rely on a warranty, he must expressly state it in his declaration. It was so decided by *Powell, J.*, in the case of *Lysney v. Selby*. (2 *Ld. Raym.* 1118.)

4. But if the court should be of opinion, that the warranty was sufficiently alleged and proved, still, as the plaintiff afterwards sent his clerk to examine the cotton, and purchased it on the faith of his inspection, without relying on the affirmation of the defendant, it was a waiver of the warranty; for it must be inferred from the evidence, that the money was not paid until after the cotton had been inspected by the clerk: and where a credit is not intended to be given, the sale is not complete, until the purchase-money is paid. *(1 *Salk.* 211. *Butterfield v. Burrows*.) It is laid down in the case just cited, from Lord *Raymond*, that if the vendee, after a warranty, examines for himself, he thereby discharges the vendor from such warranty.

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5. Another and a fatal objection arises from the variance between the declaration and the testimony produced on the trial. The proof did not in any manner support the first count, on which the jury gave their verdict. Many authorities (b) may be adduced to show how far the evidence must correspond with the allegations of the plaintiff.

[The court said, the law on this subject is too well settled to be now questioned.]

I shall contend, then, that the court ought to nonsuit the plaintiff. It was moved for at the trial, and the point reserved. The judge was of opinion that the plaintiff ought to have been nonsuited on the 1st, 2d, 4th and 5th counts, but suffered the cause to go to the jury on the third count, which is admitted to be bad. The court will now do what ought to have been done at the trial, unless they should be of opinion that the plaintiff is entitled to judgment on the third count. But as the sale in *England* was without warranty or fraud, the purchaser had no right of action against the vendor. So that, if the plaintiff had even shown that he was entitled to recover,

(a) 2 *East*, 448. *Springwell v. Allen*, in a note. See 2 *Caines*, 48 *Seixas v. Wood*, in which all the cases are fully examined.

(b) 1 *Ld. Raym.* 735. *Anonymous*. 4 *Term Rep.* 314. *Hocker v. Cooke*. 1 *Term Rep.* 447. *Charchill v. Wilkins*. *Buller's N. P.* 146.

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† *Parkinson v.*
Lee, 2 East,

it could be for nominal damages only; for he sold the cotton in such a manner as not to be legally responsible to the purchaser.† The submission to arbitration was voluntary on his part, and the payment consequently in his own wrong, for which the defendant is not liable.

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Hoffman, contra. The defendant may be entitled to a new trial; but the court ought not to nonsuit the plaintiff. It is by no means clear, that the cause ought not to have been left to the jury on the first count, in which it is stated that the defendant warranted the whole, according to the sample produced, and which was proved by one of the witnesses. It is true, that a warranty must be expressly laid. *Many respectable writers have thought that an *affirmation* amounted to a warranty. Will not an express promise, that a thing shall be of a certain quality, be equivalent to a warranty? If not so in form, it is in substance, and the defendant should have demurred to the declaration: it is now too late to take advantage of matters of form. The courts in *England* never nonsuit the plaintiff against his consent; nor will this court compel a party to be nonsuited. If the charge of the judge was correct, and the jury have found against that charge, the verdict ought to be set aside, and a new trial granted. If the declaration is defective, an opportunity may be given to the plaintiff to have it amended.

Per Curiam. There must be a new trial. We give no opinion on the point, whether the court can compel the plaintiff to be nonsuited. The verdict is so peculiarly taken, that we think the costs must abide the event of the suit.

Rule for new trial granted. (a)

(a) See ante. p. 96. *Snell and others v. Moses and others.*

WOODHAM against GELSTON.

..an action of trespass against a collector of the customs for seizing and detaining the plaintiff's vessel for a pretended breach of the law of the U. S. relative to the registering of ships, the vessel having been restored, it was

THIS was an action of trespass, for taking and detaining the plaintiff's ship. Plea, not guilty. This case was tried at the *New-York Sittings*, the 8th of *January*, 1805, before Mr. Justice *Livingston*.

On the trial, it appeared that the ship of the plaintiff had been seized, by order of the defendant, as collector of the customs of the port of *New-York*, for an alleged breach of the law of the *United States*, entitled, "An act concerning the registering and recording of ships and vessels." The ship was seized on the 2d of *October*, 1801, and remained in custody of

the marshal, until the 25th of *August*, 1802, when she was restored to the plaintiff. It was proved, that six months before the seizure, the plaintiff purchased the vessel for 12,494 dollars; that on the day *previous to the seizure, the plaintiff contracted to sell her to one *Halsey*, for 9,500 dollars, to be paid in three instalments, for which he was to receive notes at 2, 4 and 6 months, and that the execution of this contract was prevented by the seizure. On the 2d of *September*, 1802, eight days after the vessel was restored to the plaintiff, she was fairly sold at auction to the highest bidder for 4,288 dollars. It also appeared that vessels had fallen one third in value, between the time of seizure, and that of the restoration of the ship in question. No evidence was produced that the plaintiff had any employment for the ship, during the time of her detention, nor what was the rate of demurrage. It was expressly found that the plaintiff was unable to find security sufficient to obtain her liberation.

In his account, presented to the jury, the plaintiff charged the sum of 9,500 dollars, the price offered for the ship, the *interest* on that sum, and the fees paid the marshal, wharfinger, and some other items of expense, and credited the sum for which the vessel sold at auction; the jury found a verdict for the plaintiff, for the balance as stated, with interest.

The question submitted for the decision of the court was, whether the rule of damages adopted by the jury was proper. If the court should determine that the rule was incorrect, or that any of the charges were improper, then a new trial was to be granted. It was agreed, however, that any particular items might be deducted from the amount of the verdict, and a judgment given for the balance.

T. L. Ogden, for the plaintiff. The question is, What is the best rule to be adopted, so as to give the party a just compensation for the damages he has sustained? There are three modes in which the estimation may be made. 1. The difference between the value of the thing, at the time of the seizure, and at the time of restoration; 2. The amount of what the ship might have earned, in the intermediate time; 3. Demurrage for the period she was detained. The two last are liable to strong objections; the earnings depend on the nature and manner of employment, and on a *variety of circumstances, which render such a rule too precarious and uncertain to serve for the basis of calculation. *Demurrage* is in the nature of a penalty, and is always more than the damages actually sustained, and can, therefore, afford no criterion for the compensation in this case. The first rule for which the plaintiff contends, is the true one, since it gives no more than a just compensation; and, as the party intended to sell the vessel, and not to send her on a voyage, it ought to be adopted. The plaintiff ought not to suffer by the fall of the price of ships in

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held that the difference between the price at which the vessel would have sold for, at the time of her seizure, and the price she actually sold for at public auction, immediately after her restoration, together with the *actual expenses incurred*, and the interest on the amount, constituted a just and proper measure of damages to the plaintiff, as assessed by a jury

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the market, nor ought he to sustain any damages which had arisen, while the ship was in the custody of the marshal. *Trover* might have been brought in this case. (*Tinkler v. Poole*, 5 Burr. 2657.) A redelivery of the thing does not prevent the claim for damages. (*Gilb. Law of Evid.* 260. *Co. Lit.* 257. a.) The plaintiff is entitled to the same rule of estimating damages in this action, as if *trover* had been brought.

Harrison and Riggs, contra. The seizure by order of the defendant, was made in good faith. He ought not to be made liable for any fall in the market, in the intermediate time. Suppose the price of vessels had risen, would the plaintiff have been satisfied to receive the value at the time of seizure? This shows that the rule proposed, depending on the fluctuation of the market, cannot afford a just criterion of damage; the sale at auction was in some degree forced; the price agreed to be paid by *Halsey* might depend on the good or bad credit of the purchaser, and the risk of eventual payment. The more equitable mode of computing the damage would be to take the earnings of the vessel for the time, and the deterioration she may have suffered during the detention; these may be easily ascertained by merchants and ship-owners. If the party has not thought proper to bring *trover*, he cannot be entitled to any benefit, that might arise from that form of action. Interest certainly ought not to have been allowed, nor the fees of the marshal, nor wharfage, all of which were taken into the account. If the court can, on legal principles, correct the verdict, they *have the power to do so; but if they should be of opinion, that those *items* ought not to have been allowed, they must award a new trial.

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Hoffman, in reply. If the solvency of the purchaser was intended to be brought into question, it ought to have been mentioned at the trial, that the plaintiff might have been prepared to repel the objection by proofs. In *trover*, the rule of damages is the value of the thing at the time of conversion. It is absurd to say, that in an action of trespass, where the seizure is alleged to be illegal, the rule of damage should be less favorable to the plaintiff, than in an action of *trover*, where the original taking may have been lawful. In trespass, the plaintiff does not demand merely the value of the thing, but damages also for the unlawful taking; and the illegality of the seizure, in the present case, is admitted. The plaintiff ought to be indemnified for what he has lost, in consequence of the seizure; damage and loss are here convertible terms. Interest, as well as the marshal's fees, is a just charge. Nothing is more reasonable, than that a party, who is deprived of the use of his money, by the unlawful conduct of another, should be

allowed interest until it is repaid. In no other way will the plaintiff receive an adequate indemnity.

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LIVINGSTON, J., delivered the opinion of the court. We are not now to settle a rule of damage, which will be applicable in every action of trespass, but merely, whether the one contended for by the plaintiff be proper, under all the circumstances of this case. We think it is. It is seldom, that the actual injury sustained in consequence of a *tort*, can be ascertained, with so much precision. Since it can be so estimated, and the party is willing to adhere to this measure of damage, there can be no reason to prevent his recovery to that extent. The *data*, on which this estimate is formed, are more satisfactory, and leave less to an arbitrary discretion, than any which have been proposed as substitutes. The difference between the price in the first and second sale, both being fair, though some credit was given in the first, and the actual expenses he has incurred, will, with the interest, amount to no more than an indemnity *to the plaintiff, for the injury resulting from the conduct of the defendant. To such an indemnity the defendant, who is admitted to be a trespasser, cannot reasonably object. The marshal's fees must now be presumed to have been properly paid; and, if the defendant were liable for them, as was probably the case, since the property was restored, there can be no hardship in refunding them to the plaintiff; at any rate, it might have been shown to the jury, or stated in the case, that this was a mere voluntary payment, and then a deduction would have been proper. The interest has been objected to, because the jury were not obliged to allow it. If they had a discretion on this subject, it is sufficient; for, as I understand the case, we may allow every *item* which the jury might have given. Two trifling charges for wharfage and ship-keeping must be deducted, as they accrued after the restoration of the vessel. As the calculation now stands, the verdict includes a small sum, as compound interest. We are of opinion that this must be deducted, without, however, intending to say, that compound interest can never, in any case, be recovered.

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The judgment of the court is, that the two sums above-mentioned, amounting to 13 dollars, be deducted, and that simple interest be computed on the balance to the 5th day of *February* term last, and that the verdict be entered for that sum, on which the plaintiff is to have judgment.

Judgment for the plaintiff.

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v.

VANDERHEY-
DEN.

COMSTOCK *against* RATHBONE.

RATHBONE *against* COMSTOCK.

Motion to set aside a report of referees must be made the next term after the report is made.

WOODWORTH, Attorney General, moved to set aside the reports of the referees in both causes on the merits.

Foot, contra, objected that the motion ought to have been made at the last term, as the reports were made in *October*, and final judgment had been entered thereon; and no certificate to stay proceedings had been obtained until since the last term.

[*139] **Per Curiam*. The objection is fatal. The application is too late, and no sufficient excuse is shown for the delay. The case of *Shepherd ads. Case*, (a) in *January* term, 1800, is in point.

Rule refused

(a) See 1 *Johns. Cas.* 245.

SCHEMERHORN *against* VANDERHEYDEN.

A *parol* promise from one person to another, for the benefit of a third person, will enable that third person to maintain an action on such promise. Where the consideration is set forth in a written contract, evidence to show that a greater or different consideration was intended, is inadmissible. (a)

(a) *Winchell v. Latham*, 6 *Cow. Rep.* 690. *Parol* evidence, to show a consideration of a different nature from that expressed in the deed, will not be admitted, *Malley v. Hensley*, 1 *Johns. Rep.*

FROM the return to the *certiorari* in this cause, it appeared that the present defendant in error, in the suit before the justice, declared against the plaintiff in error, on a promise made by the defendant below to one *John C. Schemerhorn*, to deliver a cherry desk, of the value of 25 dollars, to *Catharine Vanderheyden*, wife of the plaintiff. No consideration was stated for the promise. The defendant pleaded *non assumpsit*, and gave notice of a set-off. The cause was tried by a jury, and upon the trial, *John C. Schemerhorn* was sworn as a witness on the part of the plaintiff, who testified, that the defendant had applied to the witness, for an assignment of his personal property to the defendant, which the witness promised to make; but declared that the witness must purchase a desk for the plaintiff's wife, who was the daughter of the witness, and a sister of the defendant. The assignment was executed by the witness, and was produced on the trial, and which was expressed to be made in consideration of natural love and affection, and of a certain bond which the defendant had executed to the witness to provide for the support and maintenance of the witness and his wife, during their natural lives. It was objected, on the part of the defendant, that no *parol* evidence was admissible to show a different or greater consideration than what was

expressed in the assignment. The justice overruled the objection, and admitted *parol* proof to be given to the jury in regard to the deed. On which evidence the defendant moved for a nonsuit, but the motion was overruled by the justice, who suffered the cause to go to the jury, who found a verdict for the plaintiff.

*The cause was submitted to the court without argument.

There were two principal exceptions to the judgment below.

1. That no action could be maintained by the plaintiff on a promise made by the defendant, to *John C. Schemerhorn*.

2. That the *parol* evidence, as to the further consideration of the assignment, was inadmissible.

Per Curiam. As to the first objection, we are of opinion, that where one person makes a promise to another for the benefit of a third person, that third person may maintain an action on such promise. This was the doctrine of the King's Bench, in the case of *Dutton and wife v. Pool*, (2 Lev. 210.) affirmed in error. The same principle has, since that time, been repeatedly sanctioned by the decisions of the English courts. (a) (*Vide* 3 Bos. & Pull. 149. in the notes to *Pigot v. Thompson*.)

But the second objection is well taken. The consideration for the assignment of the personal property of *John C. Schemerhorn*, is expressly stated in the deed of assignment itself, and the parties are thereby precluded from setting up any greater or different consideration. (*Black. Rep.* 1249. *Preston v. Mercereau*.) To allow of *parol* evidence for that purpose, would be to extend, or substantially to vary the language of a written contract. (b) Though the promise in question may have been made previously to the assignment, yet after the execution of the instrument, we must presume that the father and son altered the consideration mentioned at first, and finally acted upon that set forth in the assignment. Until the assignment was made, the promises, not being in writing, were not valid in law, and, therefore, no right of action vested in the *cestui que trust*, in consequence of the first agreement between the father and son. That was a preliminary agreement, void by the statute of frauds, and was waived when the parties consummated their contract by the written instrument.

Judgment reversed.

(a) See 1 Vent. 6. 318. 332. *T. Jones*, 103. *Cowp.* 443. 857. *Doug.* 146. 1 Str. 592. *Comb.* 219. 8 Mod. 117. 1 Bos. & Pull. 101. note (c).

(b) See *Clarkson v. Hamway*, (2 P. Wms. 204.) In *Peacock v. Monk*, (1 Vesey, 123.) Lord Hardwicke said, where a consideration is mentioned in a deed, you cannot prove any other; *after*, where there is no consideration at all expressed. In the case of *The King v. Inhabitants of Scammonden*, (3 Term Rep. 474.) Lord Kenyon said, the party might prove other considerations than those contained in a deed, and he cited *Fulmer v. Gott*, (1 Bro. P. C. 70. or vol. 4. p. 230. 2d. ed.) but that was a case of fraud, and the deed was set aside for fraud. See 8 Term Rep. 147. 379. 384.

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342; but *parol* evidence is admissible to show that the consideration expressed in a conveyance to have been received, has not been paid. *Shepherd v. Little*, 14 Johns. Rep. 510.

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N. WINDSOR
TURNPIKE Co.
v.
ELLISON.

*JOHN R. LIVINGSTON *against* PASCHAL N. SMITH
President of the Columbian Insurance Company.

The same against The same.

On the affidavit of counsel in a cause, stating that in his opinion it was a cause of importance, and that a large sum of money was depending, a struck jury was allowed.

HARISON moved for a struck jury in these causes, on the affidavit of *Bogert*, counsel for the defendant, that the causes were, in his opinion, of importance; that in one of them, the policy of insurance was for the sum of 10,000 dollars, and in the other, for 18,000 dollars, and that the plaintiff claimed for a total loss.

Hoffman, contra.

Per Curiam.

Rule granted. (a)

(a) See 2 *Caines*, 28. 380. See, also, 2 *Johns. Rep.* 211

STEINBACH and others *against* HALLETT.

Where it appears that the defendant is in prison, and notoriously a bankrupt, the court will not give judgment as in case of nonsuit for not proceeding to trial, according to notice, nor will they oblige the plaintiff to stipulate.

RIGGS, for the defendant, moved for judgment, as in case of a nonsuit, against the plaintiff, for not proceeding to trial at the last *Sittings* in the city of *New-York*, pursuant to notice given.

Radcliff, for the plaintiff, read an affidavit, stating that the defendant was in prison, and notoriously a bankrupt.

Per Curiam. The plaintiff need not stipulate.

Rule refused.

NEW-WINDSOR TURNPIKE COMPANY *against* ELLISON.

In an action brought by a turnpike company, against a person for making a highway near the turnpike-gate, to avoid the turnpike, the court allowed a special jury, at the instance of the plaintiffs.

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cial jury, at the instance of the plaintiffs.

FISK, for the plaintiffs, moved for a *struck jury* in this cause, the grounds for which were set forth in an affidavit. It was an action against the defendant for removing the fence near the turnpike-gate, and making a highway across his land, for the purpose of avoiding the turnpike, and by that means to defraud and injure the plaintiffs.

L. Elmendorf, contra, offered affidavits to prove that the removal of the fence, and making the highway, were for *the private accommodation of the defendant, and not with a view to avoid the payment of toll.

Per Curiam. Questions of this kind, affecting the public, are important in their consequences.

Rule granted.

SPENCER, J., *dissented.*

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HART
v.
STOREY.

OLNEY *against* BACON.

ERROR on *certiorari*, from a justice's court. The declaration was on a bill, to which the defendant below pleaded the general issue. The bill was shown to the justice, who *inspected* it, but no proof was called for, or offered. In this stage of the cause, the defendant demanded a trial by jury; but the justice refused to issue a *venire*, and proceeded to the trial, and gave judgment for the plaintiff.

The mere inspection of a note presented to the justice, is not such a commencement of the trial of a cause, as to preclude the party from demanding a trial by jury. *Bayless v. Craney, Gale v. Barnes, 1 Cow. Rep. 66. 235.*

Woodworth, Attorney General, for plaintiff in error. The words of the act regulating the proceedings before justices, are, "That it shall be lawful for either party to the suit, or the attorney of either, after issue joined, and before the court shall proceed to inquire into the merits of the cause, to demand of the court that the cause should be tried by a jury; and, thereupon, the justice is required to issue a *venire*," &c.† The mere inspecting the bill on which the action was brought, was not such an inquiry into the merits as to preclude the party from the benefit of a trial by jury.

† *Rev. Laws*, vol. 1. p. 496.

Foot, contra. The examination of the bill was a proceeding to inquire into the merits of the cause, within the meaning of the act, and the party was not afterwards entitled to a *venire*.

Per Curiam. The trial had not commenced by merely *taking up and inspecting* the bill, which was put in issue by the plea. The defendant was not too late in his demand of a jury, and a *venire* ought to have been awarded.

Judgment reversed

*HART *against* STOREY.

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RIKER moved for judgment, as in case of a nonsuit, against the plaintiff, for not proceeding to trial at the last *Sittings* in

The discharge of the defendant under the insolvent act is

a sufficient excuse for not proceeding to trial pursuant to a notice, and the plaintiff may discontinue without costs. *Ex parte Nelson, 1 Cow. Rep. 424*, and the cases cited.

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COCK
v.
FELLOWS.

the city of *New-York*, pursuant to the notice given in this cause.

Emott, contra, read an affidavit, stating the insolvency of the defendant, who had been discharged under the insolvent act.

Per Curiam. The plaintiff may discontinue without costs

Rule refused.

ANONYMOUS.

The words "or as soon thereafter as counsel can be heard," usually inserted in notices of arguments, are unnecessary.

NOTICE of an intended motion had been given for a certain day in term, without saying, *or as soon thereafter as counsel can be heard*. The court said, the notice was sufficient, that those words were superfluous, and that the party might make his motion on any other day in term.

COCK against FELLOWS.

A promissory note in these words, "due to the bearer hereof, 3*l*. 18*s*. 10*d*. which I promise to pay to A. or order on demand," is not a note payable to bearer, but must be transferred by endorsement.

FROM the return to the *certiorari* in this cause, it appeared that an action had been brought by the defendant in error against the present plaintiff, before a justice of the peace, in which he declared on a writing or note, in the following words: "Due the bearer hereof, 3*l*. 18*s*. 10*d*., which I promise to pay to *Abraham Thompson*, or order, on demand, as witness my hand, this 22d 11th month, 1803;" signed, *Jordan Cock*. The note was not endorsed by *Thompson*, and the declaration stated the note as made payable to the bearer. The justice gave judgment for the plaintiff below, for the amount of the note.

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**Van Antwerp*, for the plaintiff in error, insisted, that the note must be considered as payable to order, and negotiable by endorsement only. The word *bearer* was introduced merely to show the person to whom the debt was due, for which the note was given; the mode of payment was to the order of *Thompson*, without whose endorsement the plaintiff below could not maintain his action. (*Chitty*, 173.)

Metcalf, contra, contended, that the note was intended to be made payable to bearer, and transferable without endorsement; and that the words *or order* ought to be rejected as superfluous.

Per Curiam. The word *bearer* has reference to *Thompson* as the payee, and as the promise is expressly to pay to him or

order, another person could not maintain an action on the note without his endorsement. The judgment below must be reversed.

Judgment reversed.

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BREWERTON
v.
HARRIS and
HARRIS

BREWERTON *against* HARRIS and HARRIS, jun.

FROM the affidavits in this case, it appeared that *William Brewerton*, in 1799, recovered judgment in the Court of Common Pleas for the county of *Washington*, against *Moses Harris* and *Moses Harris, jun.*, on which judgment a *capias ad satisfaciendum* issued, on which the defendants were taken in execution, and paid the amount, being the sum of 80 dollars. Error was brought on that judgment into this court, and the judgment was reversed, and a restitution of the money, paid by the defendants below, was awarded.

On the judgment of reversal in this court, a *capias ad satisfaciendum* was issued against *Brewerton*, on which he was taken and remained in prison, until he was discharged by the act for giving relief in cases of insolvency.

A new action was, afterwards,† commenced in the same Court of Common Pleas, by *Brewerton*, against the same defendants, on the same contract, and for the same cause for *which the first action was brought and judgment obtained. In the second action, a verdict was found for the plaintiff for 32 dollars and 6 cents damages, on which a judgment was entered up for 88 dollars and 45 cents, damages and costs; which judgment remained unsatisfied.

Russell, in behalf of the defendants, now moved to have the 80 dollars, paid by them on the first judgment below, set off and deducted from the amount of the second judgment in the Court of Common Pleas, and that the plaintiff there should not be allowed to receive more than the balance of 8 dollars and 45 cents; or, in other words, that the *judgment of reversal and restitution* in this court should be set off against the judgment in the Court of Common Pleas.

Shepherd, contra, objected, that these were judgments in different courts,(b) and read an affidavit stating that the contract on which the first judgment was obtained in the court below, had been previously assigned by *W. Brewerton* to *Cornelius V. Brewerton*, for a full and valuable consideration, and that the former had no interest whatever in the judgment. He

Where a judgment of reversal had been obtained in this court, of a judgment in the Court of Common Pleas, and a restitution awarded, and afterwards a second judgment obtained in a new action between the same parties, in the Common Pleas, the judgment of reversal in this court was not allowed to be set off against the second judgment in the

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Common Pleas. The latter court has power to make the set-off. (a)

(a) See *Simons v. Hart*, 15 Johns. Rep. 63.

† It is supposed before his discharge.

(b) In *Schemerhorn v. Schemerhorn*, 3 Cuines, 190, a judgment in the Court of Common Pleas was allowed to be set off against a judgment in this court.

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observed, also, that the attorney had a *lien* on the judgment for his costs, which could not be included in the set-off. (*Cole v. Grant*, 2 *Caines*, 105. 2 *Black*. 867. 869. 871. *Mitchell v. Oldfield*, 4 *Term Rep.* 123.) He contended that this court ought not, in this summary way, to interfere with the proceedings of the Court of Common Pleas.

† 2 *Bos. & Pull.*
29. *Hall v. Ody.*

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Russell, in reply. The Court of K. B. has allowed a judgment in a *mayor's court* to be set off against a judgment in that court. Costs in one court have been allowed to be set off against costs in another court.† The parties are before this court, which has a control over its suitors, and may see that justice is done between them. If no authority can be adduced exactly in point, yet this court has an equitable power to extend the doctrine of set-off. *The case differs from that of *Cole v. Grant*, and the court ought not to protect the attorney, as to his costs.

Per Curiam. The Court of Common Pleas has power to set off these judgments, and they would, we have no doubt, make the deduction, on application to them for that purpose. For this court to order *Brewerton* to deduct 80 dollars from his last judgment below, and take out execution for 8 dollars and 45 cents only, would be at least an inconvenient interference with that judgment. Such an order could be enforced only by attachment. The case of *Barker v. Braham*, (3 *Wils.* 396.) shows that the common pleas have the power to make the set-off now requested.

Rule refused

HEATON against FERRIS and FERRIS.

In trespass *quare clausum fregit*, the defendant pleaded in justification a right of way over the land of the plaintiff, and a verdict was given for the plaintiff, for six cents; it was held, that the plaintiff was entitled to full costs under the statute. The certificate of the judge need not be given at the trial; it is suf-

THIS was an action of *trespass for breaking and entering the plaintiff's close, treading down the grass, &c.* The defendants pleaded the *general issue*, and two *special pleas of justification*, one of a right to a common highway, and the other, a right to a private way. The plaintiff replied to the special pleas, traversing the right of way set up in each, and the defendants rejoined, and issues were taken thereon. The cause was tried at the *Westchester circuit*, in *June*, 1804, before Mr. Justice *Livingston*, and a verdict was found for the plaintiff, for *six cents* damages. On this verdict, a judgment was entered up by the attorney of the plaintiff, and after due notice of the taxation of the costs, *full costs* were taxed on the 13th day of *January* last, by the clerk of this court, though the taxation was objected to, at the time, by the attorney of the

defendants, because the judge before whom the cause was tried, had not given a certificate, to entitle the plaintiff to full costs. The plaintiff, afterwards, on the 29th day of *January* last, obtained a certificate from the judge who *tried the cause, that the freehold or title came in question. (a)

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sufficient, if it be given afterwards, even after the clerk has taxed the costs.

Hoffman, in behalf of the defendants, now moved that the taxation of costs should be vacated, and that the defendants should have their costs taxed against the plaintiff, and execution therefor; or, if the defendants were not entitled to costs, that, then, the plaintiff should be allowed no more costs than damages. (*Farrington v. Rennie*, 2 *Caines*, 220.) The freehold in the land was admitted to be in the plaintiff. The defendants claim only a right by prescription, of passing and re-passing over the land of the plaintiff. A justification of a mere right of way over the freehold of the plaintiff did not bring the title into question.

Emott, contra. The words of the statute† are, "that in all actions of trespass, &c. wherein the judge, at the trial of the cause, shall not find and certify, under his hand, upon the back of the record, &c., that the freehold or title of land mentioned in the plaintiff's declaration was chiefly in question, the plaintiff, in case the jury shall find the damages to be under the value of five dollars, shall recover no more costs of suit, than the damages so found shall amount to." The right of way is a title in relation to land. The general issue itself puts the title in question; but the plaintiff, in his replication, has directly traversed, and taken issue on the plea of title. The case of *Farrington v. Rennie* (b) having been decided since the trial of this cause, it ought not to influence the decision in the present case. The statute did not require that the certificate should be given at the trial, but merely that the judge *who presided at the trial should give the certificate, which may be done afterwards.

† Sess. 24. c.
152. s. 6.

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Harrison, in reply. If the general issue put the freehold or title in question, the provision in the act was nugatory. A claim to a mere right of way did not bring the freehold or title to land in question, within the meaning of the act. Costs are *stricti juris*, and not to be allowed, unless the party shows that he is clearly within the provisions of the statute.

Per Curiam. In this case, the title to land came in ques-

(a) *Striker v. Mott*, 6 *Wend. Rep.* 465.

(b) In that case, decided in *November* term, 1804, though the 4th section of the act concerning costs does not require a certificate, the court said, that instead of looking at the pleadings, they would, in all future cases, require a certificate of the judge who presides. In the 4th section it is said "that if, in any personal action prosecuted in the Supreme Court, the plaintiff shall not recover above the sum of 50 dollars, he shall not recover costs, but shall pay costs to the defendant." *Provided*, that nothing therein contained, "shall extend to any action where the freehold or title to land shall in any wise come in question." See 1 *Term Rep.* 636. 6 *Term Rep.* 11. 7 *Term Rep.* 449.

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tion, so as to entitle the plaintiff to full costs under the act, and the certificate was properly granted.

Rule refused

SEAMAN, Demandant, against WILLIAM MILLER, Tenant.

This court will not order a judgment to be signed, *nunc pro tunc*, to give effect to a judgment under the statute creating forfeitures for adhering to the enemies of the state, passed in 1782.

† See Greenleaf's edition of the *Laws*, vol. 1. p. 26.

THE demandant, *Adam Seaman*, had been convicted on an indictment before the General Sessions of the Peace, in the county of *Westchester*, of *adhering to the enemies of the state*, on which judgment of forfeiture was entered in the Supreme Court, in the term of *October*, 1782, pursuant to an act of the legislature entitled, "An act for the forfeiture and sale of the estates of persons who have adhered to the enemies of this state, and for declaring the sovereignty of the people of this state in respect to all property within the same," passed the 22d of *October*, 1779.†

The rule for judgment had been regularly entered in the minutes of the clerk of the court, and the record was made up, but not *signed*.

Woodworth, Attorney General, now moved, that the record, a copy of which was produced, should be signed, *nunc pro tunc*.

Per Curiam. We are not disposed, at this day, to lend our aid to give effect to forfeitures made during the late revolutionary war.

Rule refused.

[* 149] *J. H. SLEIGHT against HARTSHORNE, RHINELANDER, and others.

Where no objection is made at the trial of an action on a policy of insurance for want of *preliminary proofs*, but the parties proceed on the merits, the court will allow the special verdict to be amended by adding the *preliminary proofs*.

PENDLETON, for the defendant, moved for leave to amend the special verdict in this cause, by striking out the following words, "that the said plaintiff made to the said defendants, the usual proof of interest, and proof of loss, more than thirty days before the commencement of his action, as was required by the said writing or policy of assurance," which had been added to the verdict when it was corrected before the judge who tried the cause.

Radcliff and *Hoffman* opposed the motion. They cited 3 Term Rep. 749. *Bac. Abr.* tit. *Verdict*. *Com. Dig.* tit. *Amendment*, P.

Harrison replied.

It appeared that there had been a long trial of the cause upon its merits, during which no question was made as to the preliminary proofs, which were not called for, nor were they stated in the heads of the special verdict found by the jury.

Per Curiam. As the defendants at the trial made no objection to the want of preliminary proofs, but proceeded in their defence on the merits of the cause, it must be presumed that their existence and competency were admitted. Being matter merely formal, and not controverted by the defendants, it was proper to state their admission in the special verdict.

Rule refused

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DUNLAP and GRANT *against* THE COMMERCIAL INSURANCE COMPANY.

RADCLIFF, after plea pleaded, moved for leave to pay money into court, as the *premium* on the policy of insurance, on which this action was brought. He cited 1 *Term Rep.* 710.

**Per Curiam.* The defendant may pay into court what sum he pleases, with the costs of suit up to the time of such payment, but not specifically as the *premium* on the policy; and this may be done after plea pleaded.

After plea pleaded, leave was granted to pay money into court with [* 150] costs to the time, but not specifically as the *premium* on the policy of insurance on which the action was brought.

WATSON and WATSON *against* DELAFIELD.

PENDLETON, in behalf of the defendant, moved for leave to amend the *special verdict* in this cause, by adding the following words; "that one of the letters ordering insurance to be effected, was put on board of a certain brig therein mentioned called the *Friends*, at *Jamaica*," or that a *venire de novo* may issue, to ascertain that fact. He read an affidavit stating, that on a second trial of this cause in *April* last, the jury found the heads of a special verdict; that two or three weeks after, he received the draft of the special verdict, to which he proposed certain amendments, which were delivered to the plaintiffs a day or two after, believing it to be the practice, to insert in a special verdict, when drawn up in form, such facts as were proved by written evidence, and were uncontradicted; that the fact now proposed to be inserted, appeared in the deposition

Where a fact at the trial of a cause, is not controverted, nor litigated before the jury, the court will order a *venire de novo*, to ascertain such fact, unless the opposite party will consent to amend the *special verdict*, by inserting it; it appearing to have been omitted by the counsel at the time from a betu-

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that it might be inserted when the special verdict was drawn up in form. Where the assured had written four letters, by different conveyances, ordering insur-

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ance, one of which was on board the vessel in which the assured arrived, after a knowledge of the loss, at a port from which the letter is sent by mail, he is bound to communicate the news of the loss immediately, or by the same post, so that the insurance may be countermanded.

† See 2 Term Rep. 125, 126, and the note.

of *Enoch Rust*, one of the witnesses, and also in the minutes of the judge who tried the cause ; but the judge refused to allow the proposed amendment. The affidavit further stated several circumstances to corroborate the truth of the fact, which the defendant wished to have inserted in the special verdict.

To show the authority and practice of courts, in amending special verdicts, the following cases were cited : *Rees v. Morgan*, 3 Term Rep. 750. *Petrie v. Hanney*, *Ibid.* 659. *Doe, ex dem. Church, v. Perkins*, *Ibid.* 750. *The King v. The Mayor, &c. of Gravesend*, 7 Term Rep. 699. *Grant v. Astel*, Doug 722. *Williams v. Breedon*, 1 Bos. & Pull. 330. *Skutt v. Woodward*, 1 H. *Black. 238. 7 Bac. Abr. tit. *Verdict*, D. *Gwillim's* edition. It was contended, that *Rust's* evidence was not discredited at this trial, and that, on the former trial, the fact was conceded, and seemed, indeed, to be necessarily implied from what was found by the jury.

Riggs and Radcliff, for the plaintiffs, admitted that the witness did, in his deposition, swear to the fact which the defendant's counsel now wished to have inserted in the special verdict ; but they denied the truth of the fact, and insisted that the jury, by not finding it, had, by their silence, negatived its truth ; that the counsel for the defendant drew up the heads of the special verdict, and if they had omitted to insert this fact, it must be imputed to their own negligence ; it was now too late to supply it. The present application is irregular, and ought not to be sustained, for it is substantially a motion for a new trial. A *venire de novo* is never granted in a case like the present.†

Harison, in reply. The present question is of great importance, as it involves a principle not yet decided, as to the power of the court over trials by jury. If the court can never interpose in such cases, the most dangerous consequences are to be apprehended from the practice of finding special verdicts. They furnish a convenient and easy method, by which juries may indulge their prejudices, or evade their duty with impunity ; for since the abolition of *attaints*, the court would have no power over them. The salutary and highly necessary power of granting new trials would be defeated, if juries might, whenever they thought fit, find special verdicts, without any possibility of correction or control.

The fact, proposed to be inserted in the verdict, was one which the counsel, in his affidavit, supposed to be uncontroverted, and which could be afterwards added. There was no evidence before the jury, to justify them in disbelieving the testimony of *Rust*. If they intended, by their verdict, to show their disbelief of this fact, they must have acted arbitrarily, as there was nothing to warrant such a conclusion.

He spoke in very forcible terms against the abuses, which

*might result from the practice of allowing juries to find special verdicts, according to their own pleasure or caprice.

Per Curiam. We are satisfied, that the jury never considered this fact as litigated, and that the counsel for the defendant took it for granted, that it would be inserted in the special verdict, of course, as an unquestionable fact. It would be unjust, therefore, to deprive the party of the means of ascertaining whether or not the jury did find it. We are of opinion, therefore, that a *venire de novo* should be awarded, to try the single fact now in question.

On the next day, the counsel for the plaintiffs consented to insert the fact above stated, in the special verdict; and the cause was then argued on the verdict as amended.

The following are the material facts which it contained.

The cause was tried at the *New-York Sittings, April, 1805*, before Mr. Justice *Thompson*.

The policy, interest, loss and abandonment, were proved on the trial. The policy in question was effected by the plaintiffs, on the 12th *October, 1801*, pursuant to an order from *Henry Stouffer*, of *Baltimore*, contained in a letter, written the 8th *October*, and addressed to them as his agents, on 850 *doubloons*, equal to 13,600 dollars, on board of the schooner *Harriet & Ann*, *Rhodes*, master, from *Jamaica to Baltimore*. The vessel sailed from *Kingston*, the 26th *August, 1801*, on the voyage insured, in all respects seaworthy, with the property insured on board, which belonged to *Henry Stouffer* and *Andreas Finkin*, for whose account the insurance was made. The *doubloons* were neutral property, and continued on board until the 14th *September, 1801*, when they were lost in the vessel, which foundered and sunk, by the perils of the sea. Before the vessel sailed from *Jamaica*, *Finkin* wrote four letters, dated at *Kingston*, the 16th *August, 1801*, of the same tenor and date, directed to *Henry Stouffer* of *Baltimore*, advising him of the intended shipment of the *doubloons*, and directing insurance to be made. The letters were sent by different conveyances, to the *United States*; one of them was put into the post-office at *Norfolk* in *Virginia*, on the 1st *October, 1801*; another of the letters had the post mark of "*Charleston, S. Carolina*;" another, on which the post mark was illegible, except "*19 cents*;" and the other, marked "*ship 6 cents*," were all received, at the counting-house of *Stouffer*, at *Baltimore*, at the same time, on the 7th *October*; and were all actually delivered to him on the 7th or 8th day of *October*; at that time he knew nothing of the loss of the vessel, and was not informed of it until the 14th day of the same month.

Finkin was on board of the vessel on her voyage; and at the time she foundered, went on board the brig *Lucy*, with *Rhodes*, the master of the *Harriet & Ann*, bound to *Boston*, where he continued until the 29th *September*, when he

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was put on board the brig *Friends*, of *New-York*, then going into *Norfolk*, in distress. One of the letters ordering insurance to be effected, was put on board of the *Friends* at *Jamaica*.

The *Friends* arrived at *Hampton Roads* on the 30th September; *Finkin* remained at *Norfolk* seven or eight days, but owing to contrary winds, no packets sailed from thence for *Baltimore*; he was sick most of the time he was at *Norfolk*, and did not go ashore until the 6th of October. He was a *Danish* burgher, and it did not appear, that he had ever been in *Norfolk* before; he had sailed out of *Baltimore* in 1799, but there was no evidence that he had been a resident there.

While *Finkin* was at *Norfolk*, he wrote a letter, dated the 1st October, 1801, addressed to a person in *Boston*; but there was no evidence that the letter had been sent by mail. *Finkin*, with *Rhodes*, the master of the *Harriet & Ann*, went by water, from *Norfolk* to *Baltimore*, and arrived at *Fell's Point* the 12th October, and on the same day *Finkin* wrote a letter to *Henry Stouffer*, informing him of the loss of the schooner and the doubloons, which letter was received by *Stouffer*, on the 14th day of the same month. The vessel in which *Finkin* and *Rhodes* went from *Norfolk* to *Fell's Point*, was prevented by the quarantine regulations, from going up to the city of *Baltimore*, on her arrival.

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**Norfolk* is a regular post-town, and the mail is seven days in going from thence to *Baltimore*. The bill of lading of the property was filled up in the *English* language, in the handwriting of *Finkin*, who, while he was at *Norfolk*, wrote a letter, addressed to Captain *Rust* of *Boston*, dated the 6th October, 1801, which had the post-mark of that day; he mentioned his having written before, to another person in *Boston*, that he had forgotten the money he put into the hands of Captain *Rust*, when he left the vessel, which was in doubloons, and requested it might be forwarded to Mr. *Stouffer*. It appeared also that *Rhodes*, the master of the *Harriet & Ann*, went on shore, at *Norfolk*, on the 30th September, and made his protest before a notary public of that place.

This cause had been tried before, and on the motion for a new trial, the points of law were fully argued by the counsel. (See 2 *Caines*, 224.)

Radcliff, for plaintiffs, (*Hoffman* and *Riggs*, on the same side,) contended, that several new facts appeared in the case now before the court, which rendered it, in several important particulars, different from the one presented on the former argument for a new trial. He admitted, that where an order of insurance is given, and immediately after the party receives news of the loss, and does not countermand the order, such conduct must be considered as evidence of fraud. But here *Finkin* was perfectly innocent. He knew nothing of the arrival of the order, nor of that given by *Stouffer* for the insur-

ance. No fraud or negligence can fairly be imputed to him. When he arrived at *Norfolk*, and during his stay there, he was sick, a stranger, and ignorant of all those circumstances, the knowledge of which might be deemed as evidence of a fraudulent inaction. It may be said, so far as the insurance is to be presumed to have been made on the order sent by the *Friends*, it must be considered as fraudulent; but if that letter had been stopped, it could not have made any difference, as all the letters were actually received at the same time.

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Harison, contra. (*Pendleton*, on the same side.) It is attempted to show, that the case now before the court is materially different from that presented on a former occasion, *but if perused with attention, its features will be found essentially the same. No fact appears, which can possibly induce the court to alter the opinion they have before expressed. It is found that four letters, instead of three, were sent, directing the insurance to be made. This circumstance did not vary the case, for if *Finkin* knew that any one of them had not arrived, his duty was precisely the same. Whether the vessel arrived at *Hampton Roads*, or *Norfolk*, did not vary the merits of the case; and whether *Finkin* went on shore or not, at *Norfolk*, was perfectly immaterial, if he was able to write a letter. The sickness, which is alleged as an excuse for his not writing to give information of the loss, can be of no avail. He was well enough to write two letters to *Boston*, and could have written to *New-York* and *Baltimore*. To render it a sufficient excuse, his sickness should have been so severe, as totally to incapacitate him from doing business. He cannot allege his ignorance of mails and post-days, or that he had no opportunity to send a letter; for the captain went on shore the 30th *September*, and he might have sent his letter by him to be forwarded. In short, it will be found, that the facts in the present verdict are the same as those stated in the former case, and that the new circumstances which appear are wholly immaterial. It is said that the opinion before given by the court goes much further than any case decided in the courts of *Great Britain*.† I think not; for here is that *crassa negligentia*, that gross neglect in the party, which has the same effect as fraud. It was the duty of *Finkin*, knowing of the letters sent by him, directing the insurance, to have written immediately on his arrival, to *Stouffer*, to inform him of the loss. The insurers ought not to be made answerable for his supineness, or neglect.

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† *Cresser v. Young, Miller* 65. *Fisher v. Mather*, 1 Term Rep. 12. See, also, *Guidon, 4. Marine Ord. of France*, art. 38, 39. *Emerigon*, 157 *Pothier, d'assu* art. 1. § 24.

Per Curiam. This special verdict presents nothing to induce us to change the opinion we have before given in this cause. (a) The additional facts or circumstances, which it con-

(a) See 2 *Caines*, 224.

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tains, do not, in any degree, vary the merits of the case. We shall, therefore, adhere to our former decision.

Judgment for the defendant.(a)

(a) This judgment was afterwards affirmed in the *Court of Errors*. See vol. 2. p. 526

[*156] *BRANDT, *ex dem.* WALTON, against O. and D. OGDEN.

Baker's Falls are the third falls, mentioned in the *Kayaderosseras* patent. The commissioners in the partition of that patent, in 1770, took the true north-west-most head of the *Kayaderosseras*, and it is rightly laid down on their map.

The term *northerly* in a grant, where there is no object mentioned to direct the inclination of the course towards the east or west, is construed to mean *due north*.

To maintain a title on a claim of adverse possession, such possession must be adverse at its first commencement, and continue so, uninterruptedly, for 20 years. (b)

THIS was an action of *ejectment*. The cause was tried at the *Washington* circuit, on the 12th June, 1805, before Mr. Justice *Spencer*, when a verdict was found for the defendants. The plaintiff claimed title to lot No. 10. in the 25th allotment of the *Kayaderosseras* patent, granted November 2, 1708; the only words of which, material in the present case, are, "*thence northerly to the north-west-most head of a creek, entitled Kayaderosseras, about fourteen miles more or less; thence eight miles more northerly, thence easterly or north-easterly to the third falls on Albany River, about twenty miles more or less.*" This patent had been divided, in 1770, by certain commissioners, who had run the boundary lines, which the plaintiff contended were the true limits of the patent. The defendants claimed title to the premises in question, under the *Queensborough* patent, dated the 1st June, 1762, and insisted that a certain creek assumed by *William Cockburn*, the deputy surveyor-general, as the north-west-most head of the *Kayaderosseras*, was the true one, and that the premises in question consequently fell within the bounds of the *Queensborough* patent.

On the trial of the cause, it was admitted, that the *third falls*, laid down by the commissioners in the partition of the first patent, are the same as designated in that patent as the third falls in the *Albany* (*Hudson*) River, and known by the name of *Baker's Falls*. (a)

On the motion made to set aside the verdict in this cause, as against evidence, as well as law, the following questions were raised for the consideration of the court.

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(b) See *Jackson v. Stephens*, 13 Johns. 495. *Jackson v. Johnson*, and *Jackson v. Brink*, 5 Cow. Rep. 74. 483. *Jackson v. Woodruff*, 1 Cow. Rep. 376. 19 Johns. 363.

1. Whether, in the map of the partition, made by the *commissioners, about the year 1770, in running from the station on the *Schenectady*, or *Mohawk* River, they have assumed the real north-west-most head of the creek called *Kayaderosseras*.

2. Whether, as the patent describes the course from that

(a) This case had been tried at a former circuit, when a verdict was found for the plaintiff, which the defendants moved to set aside. The only question at that time was as to the concluding point in the boundary lines of the *Kayaderosseras* patent, or, which were to be considered as the *third falls*, in *Hudson* River? The plaintiff insisted that they were those known by the name of *Baker's Falls*, and the defendants, that they were the *Fort Miller Falls*. The court being of opinion, from the facts presented in the case, then before them, that the latter were the third falls, awarded a new trial. See 3 *Caines' Rep.* 6.

point to be *eight miles more northerly*, the commissioners were correct in running the line *a due north course*.

3. Whether the defendants have made out an *adverse possession* of twenty years.

Harrison and Henry, for the plaintiff.

Foot, for the defendants.

As the arguments of the counsel would not be understood without a reference to the map, it is unnecessary to state them.

SPENCER, J., delivered the opinion of the court. The defendants contended that a creek running into the *Kayaderosseras*, and rising considerably farther to the south-west than the one to which the commissioners run the line, was in regard to its position, the real *north-west-most* head of the *Kayaderosseras*; but, in fact, the creek thus taken by the defendants, has always been known and called by the name of *Coesa*, and never by that of *Kayaderosseras*. This was proved by several witnesses, produced by the plaintiff at the trial, who had been acquainted with the country since its first settlement, and who were uncontradicted by any evidence adduced on the part of the defendants. It is true, that after the *Coesa* disembogues into the *Kayaderosseras*, the name of the former is lost, but above the junction, the main stream retains the name of *Kayaderosseras*. Without reference to the geographical situation of the two streams, it is incontrovertible that the commissioners did right in running to the head of the river, which was called *Kayaderosseras* to its source. It was said, that the distance from the *Mohawk* to the head of the *Coesa*, agreed better with the distance required by the patent; but it may be observed, that in all probability, no survey had been made prior to the grant of the patent of *Kayaderosseras*, and that the object being once ascertained, the distance can have no influence.

*The term *northerly* in a grant, where there is no object to direct its inclination to the east or to the west, must be construed to mean north; and were it not for the head of the *Kayaderosseras*, that course would have been thus run; but that object gave direction to the course. With regard, then, to the course, "thence eight miles more northerly," there being no object to control it, it must be a *due north line*. This construction (a) is enforced by the recognition of this line by the government, which, though it would not divest a right acquired under a senior patent, yet serves to illustrate the sense of government on the point. The line run by the commissioners must, therefore, be considered as the true one.

The fact of adverse possession in the defendants stands thus: about 44 years ago, one *Abraham Wing* took possession

(a) This was decided to be the true construction of the patent, in *January term, 1802*, in the case of *Jackson, ex dem. Woodworth, v. Lindsey, 3 Johns. Ca. 86*.

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in the town of *Queensborough*, and began some improvements on a creek, near the possession of the defendants, which was continued until the war, when *Wing* quitted it; two or three years after the termination of the war, one *Smeed* was seen in possession, and the witnesses understood, that the defendants took possession under *Smeed*, and had held the premises 14 or 15 years. In order to bar the recovery of a plaintiff who has title, by a possession in the defendant, strict proof has always been required, not only that the first possession was taken under a claim hostile to the real owner, but that such hostility has existed on the part of the succeeding tenants; it is also requisite that such possession should be marked by definite boundaries. In the present case, the extent of *Wing's* first possession is not shown, nor does it appear that he entered with a claim of title. *Smeed's* possession is not connected with that of *Wing*, nor is the defendant's with that of *Smeed*. There is no continuity of possession. Under these circumstances, it cannot be pretended that this is an adverse possession of twenty years.^(a) The court are unanimously of opinion, that there must be a new trial, on the usual terms.

New trial granted.

(a) See *Jackson, ex dem. Hardenbergh, v. Schoonmaker*, (2 Johns. Rep. 230.) *Jackson, ex dem. Murray, v. Hasen*, (2 Johns. Rep. 22.) *Jackson, ex dem. Dill, v. Tyler*, (2 Johns. Rep. 444.) *Jackson, ex dem. Griswold, v. Bard*, (3 Johns. Rep. 230.) *Jackson v. Leonard*, (9 How. Rep. 653.)

END OF FEBRUARY TERM.

CASES

ARGUED AND DETERMINED

IN THE

Supreme Court of Judicature

OF THE

STATE OF NEW-YORK,

IN MAY TERM, IN THE THIRTIETH YEAR OF OUR
INDEPENDENCE.

JACKSON, *ex dem.* YOUNGS and others, *against*
VREDENBERGH.

THIS was an action of ejectment, for a lot of ground and dwelling-house, in the city of *New-York*. The cause was tried at the *New-York Sittings*, the 27th of *April*, 1804, before Mr. Justice *Kent*.

On the trial the plaintiff proved, that *David Youngs*, a mariner, was, in his life-time, seised of the premises in question, and died (at sea) so seised of the same, about the year 1766; that he left a widow, and an only son, who died the 28th *June*, 1774, scarcely eight years old; that *Christopher Youngs* was the eldest brother of *David*, and died in 1798, leaving the lessors of the plaintiff (or those under whom they claim) his heirs at law.

The defendant then read in evidence, a deed dated the 20th *January*, 1798, by which *Christopher Youngs* conveyed to *Joseph Corre*, in fee, the lot in question for the sum of 1,000 dollars.

*To rebut this evidence, the plaintiff offered *Joseph Corre*, as a witness, to prove, that at the time he received the said deed, he was a tenant of the premises under the defendant, who held adversely to the lessors of the plaintiff. It was objected that he was an incompetent witness, as he was still a tenant under *Vredenberg*; and that the testimony he was called upon to give was also inadmissible. Both objections were overruled, and the witness proved his tenancy under *Vredenberg*, which the judge declared rendered the deed a nullity.

In an action of ejectment, the tenant is a competent witness, where he is called to prove a fact against his interest.

The deed of a person out of possession being void, does not preclude the grantor from maintaining an action of ejectment to recover the possession of the same premises.

Evidence of the declarations of one who has given a deed with warranty, cannot be re-

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ceived to support a title deduced from such person, though such declarations be made *in articulo mortis*; (x) but

(x) *Wilson v Boerm*, 15 *Johns. Rep.* 386, and the *New-York* cases there cited.

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such declara-
tions may be re-
ceived in evi-
dence to show
in what charac-
ter, or with what
intent, such per-
son entered and
held possession
of the land.

A deed of the same premises was then produced by the defendant, made to him by *Benjamin S. Rowe* and his wife, for the consideration of 1,000 dollars, dated the 2d May, 1793, and another deed from *Sarah Punderson*, formerly the wife of *David Youngs*, to the said *Rowe*, dated the 15th February, 1792, for the consideration of ten shillings, which contained no other covenant or warranty than the following: "And the said *Sarah Punderson* doth warrant and defend the said premises to the said *Benjamin S. Rowe*, his heirs and assigns for ever."

The defendant then attempted to prove that the premises in question were devised by the said *David Youngs* to his wife, afterwards *Mrs. Punderson*, by a will which was lost. Several witnesses testified as to the conduct of *Sarah Punderson*, who had always acted as owner of the premises, and had received the rents to the time of her death; and that during the *American* war, her house was broken open and plundered by a party of armed men, who carried away her papers, which they took from a desk; but whether any will was contained among them, or what became of the papers afterwards, did not appear. She had, in 1790, offered to sell the lot to one of the witnesses, and she died in 1797. Some conversations were also proved between *Christopher Youngs* and *Sarah Punderson*, tending to show that he considered the premises as her property, and that they formerly belonged to her grandfather.

It was admitted that *Sarah Punderson* and those claiming under her had been in possession, and received the rents and profits *of the premises in question ever since the death of *David Youngs*. The present action was commenced the 28th September, 1801.

As further evidence of the existence and loss of the will of *David Youngs*, the defendant offered a witness to prove the declarations of *Sarah Punderson*, "who, at divers times in her last illness, while in the perfect possession of her mind and memory, and especially a few hours before her death, had declared that her husband left a will, by which he gave her the premises in question; which will was taken from her when her house was plundered; that, in the last instance, she made her declaration, on the faith of a dying woman; and the witness and others being present, she charged him and them to attest her words in court, if occasion should offer: that immediately after the death of her husband, and always during her life, she had made declarations to the same effect, and, particularly, at the time her house was plundered, she complained most of the loss of her husband's will."

This testimony was rejected by the judge, as inadmissible.

In his charge to the jury, the judge stated his opinion, that the evidence did not warrant the inference, that *Sarah Punderson*, during the life of her son, held the premises in her own right, or adversely to him, or otherwise than as guardian in

socage, or dowager; that the entry of the lessors of the plaintiff was not barred by the statute of limitations; that the existence of a deed or will might be presumed; but that in the present case, he did not think there was sufficient evidence to warrant that presumption; and that the deed from *Christopher Youngs* to *Corre* was a nullity.

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The jury found a verdict for the plaintiff, which the defendant moved to set aside, as against evidence, and for the misdirection of the judge. The grounds for the application for a new trial, were,

1. That *Corre* was not an admissible witness; or, if admitted, he ought not to have been permitted to prove his own adverse possession;

* 2. That the deed for *Corre* was valid, and effectual to defeat the present action;

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3. That the evidence of *Sarah Punderson's* declarations ought to have been received in evidence;

4. That there was sufficient evidence to show that *Sarah Punderson*, during the life of her son, held as owner, and adversely to him;

5. That the entry of the lessors of the plaintiff was barred by the statute of limitations;

6. That it should have been left to the jury to presume a will; and,

7. That it appeared that the premises were the property of an ancestor of *Sarah Punderson*, and it did not appear that *David Youngs* had acquired a title to them.

The motion for a new trial was argued in *November* term last, by *Sanford* and *Hoffman*, for the lessors of the plaintiff, and by *Riggs* and *Hopkins*, for the defendant.

TOMPKINS, J., now delivered the opinion of the court. The first point relied upon, in support of the motion for a new trial, is, that *Joseph Corre*, the tenant in possession of the premises in dispute, was improperly admitted as a witness. He was offered on the part of the plaintiff, for the purpose of proving, that when the witness accepted a deed of the premises from *Christopher Youngs*, he was in possession as tenant to the defendant. To give validity to this objection, it ought to appear, that the interest of the witness was against the defendant. For the reason of the rule of evidence which deprives the landlord of the benefit of the tenant's testimony is, that the tenant cannot be permitted by his evidence to support his own possession. (*Cowp.* 622. *Doe v. Williams.* 1 *Str.* 632. *Bourne v. Turner.* *Woodfall*, 2d ed. 492.) That reason does not apply in this case, for the interest of the witness was against the party calling him. A person interested in a cause, is an objectionable witness only when he comes to prove a fact consistent with his interest; but if he be called to give evidence contrary to that interest, he is the best possible witness,

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and no objection can be made to him by a party in the cause (*Peake's Ec.* 112.)

* The case of *Jackson, ex dem. Jones and others, v. Brinckerhoff*, (April term, 1802,) in this court, has disposed of the second point. It was there determined, that the deed of a person out of possession being void, did not preclude the grantor from maintaining an action of ejectment to recover possession of the same premises. (a)

Another ground for a new trial is, that certain testimony offered by the defendant, and which ought to have been admitted, was overruled by the judge. This evidence was relative to the declarations of *Sarah Punderson*.

This testimony, though not immediately preceded by a declaration of the purpose for which it was intended, must be deemed, from the whole case, to have been offered to prove the existence of a will, or to lay the foundation for the jury to presume a will.

Apart from the declarations of Mrs. *Punderson*, there appears no evidence upon which to found such a presumption. Those declarations are not, in my opinion, admissible for that purpose, because Mrs. *Punderson*, if living, could not have been a witness to prove that fact, as she had given a warranty deed of the premises, and consequently was interested to support a title deduced from her. It will not, therefore, be necessary now to determine whether under any, and what circumstances, the declarations of a competent witness, *in articulo mortis*, can be introduced as legal evidence in a civil case.

But for another purpose, the declarations of Mrs. *Punderson* were clearly evidence, namely, to show in what character, or with what intent, she entered, and held possession of the premises in dispute. The plaintiffs contended, and the judge, in his charge to the jury, adopted the opinion, that the mother ought to be presumed to have entered and held as guardian *in socage* to her son. (b) Such ought, undoubtedly, to be the inference where the entry and perception of rents are unaccompanied with acts or declarations inconsistent with that character. In the case of *Newman v. Newman*, (3 *Wils.* 516.) it is repeatedly mentioned, that the entry of the mother, and the perception of the rents *was not attended with any declarations or acts to evince with what intention, or by what right or authority, or in what character, she took possession. It was, therefore, perfectly reasonable in that case to presume the entry as guardian *in socage*, which was the only character in which the mother could rightfully enter, rather than presume a wrong, or *disseisin* by her. The facts in the present case, however, are widely different. Here Mrs. *Punderson* leased the whole as her own, and without describing herself as guardian, re-

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(a) See *Williams v. Jackson, ex dem. Tibbitts, in error.* (5 *Johns. Rep.* 489.)

(b) 3 *Cruise's Dig.* 411. tit. 29. c. 3. s. 73, 74, 75. 1 *Inst.* 15. a. *Gilb. Ten.* : 29 *Jenk.* 242. pl. 25. 7 *Term Rep.* 386. *Whitcomb v. Whitcomb, Prec. in Chan.* 1

ceived and applied the whole rents, offered to sell and did sell as her own, and uniformly, during her life, declared the premises to be her own, and traced her title to a will of her husband, which she alleged to have existed. These facts distinguish the case from that of *Newman v. Newman*.

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If she held adversely to her son, an important question upon the statute of limitations would arise. But if she held as guardian *in socage*, the statute does not bar the plaintiff; for the proviso with respect to the limitation to 10 years applies only to cases where the infant does not die seised. Whether the widow, in this case, held adversely, or as guardian *in socage*, is a question of fact for the decision of a jury; and for the more satisfactory determination of that question, upon the evidence which was excluded upon the former trial, in addition to that upon which the verdict already given was founded, I think a new trial ought to be awarded. But as the judge was correct in overruling the testimony, as improper to establish the existence of a will, and as it was not contended by the defendant's counsel on the trial, that it ought to be admitted for the purpose for which I have considered it as admissible, the rule is granted upon payment of costs by the defendant.

New trial granted.

*PECK against the Trustees of RANDALL, an absent Debtor.

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THIS was an action on the case. The declaration contained eight counts: 1. For services, work, labor, care and diligence as master of two certain vessels, &c.; 2. *Quantum meruit* thereon; 3. For work and labor, care and diligence, in recapturing a certain schooner or vessel called the *Romp*; 4. *Quantum meruit* thereon; 5. For work and labor generally; 6. *Quantum meruit*; 7. For money paid, laid out and expended; and, 8. For money had and received to the use of the plaintiff. The defendants pleaded *non assumpsit* and *non assumpsit infra sex annos*, to which there was a replication and issue.

The cause was tried at the *New-York Sittings*, before Mr. Justice *Livingston*, on the 8th of *December*, 1804, when the jury found a verdict for the plaintiff for 1,122 dollars damages, subject to the opinion of the court, on the following case:

Paul Richard Randall was owner of the schooner *Pomona*, of which the plaintiff was master. The vessel sailed from *New-York*, in the month of *May*, 1796, for *Cape Francois*, in the island of *St. Domingo*, having on board a cargo consisting chiefly of flour, belonging to *Randall*, and 20 barrels of flour, the private adventure of the plaintiff. The cargo, as well as

Under the act for giving relief against absent and absconding debtors, the creditor cannot maintain a suit at law for his debt, against the trustees appointed pursuant to the act before the demand has been proved or adjusted, and the dividend declared. The proper remedy is by petition to the equity power of the court under which the proceedings are instituted, which will either compel the trustees to do their duty, or advise them in cases of doubt

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or difficulty. (a)
The trustees
under this act
may plead the
statute of limi-
tations, in the
same manner as
the debtor him-
self could have
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done.

When the
statute of limi-
tations begins to
run, it con-
tinues, notwith-
standing any
subsequent dis-
ability.

No salvage is
due for the res-
cue or recapture
by a neutral
from a friendly
power.

(a) See the
cases cited in
The Matter of
Bradhurst, &c.
16 Johns. 14.

the adventure of the plaintiff, were sold at *Cape Francois*, and *Randall* received payment for the whole, in bills of exchange on the *French* government. *Randall*, with the plaintiff, returned to *New-York*, in the *Pomona*, the 18th of *August*, 1796 and there fitted out another vessel, called the *Romp*, to which the plaintiff was appointed master, and sailed from *New-York* for *St. Domingo*, about the 18th of *September*, 1796, with *Randall*, the owner of the vessel and cargo, on board. The *Romp* arrived at *Cape Francois* in *December*, at which place the greater part of her cargo was sold. From *Cape Francois*, *Randall* and the plaintiff proceeded in the *Romp* to *Jacmel*, and on her passage *to that place, she was captured by a *British* ship of war, and ordered to *Jamaica*. On her passage towards that island, she was recaptured by the plaintiff and *Randall*, and carried into *Aux-Cayes*. A boy and a negro were on board, and the former assisted in the recapture, which was effected against a much superior force. The *Romp*, afterwards, in attempting to go from *Aux-Cayes* to another port in the same island, was captured by another *British* ship of war, and sent to *Jamaica*, with *Randall* and the master, who were kept in confinement. After being detained as prisoners for some time, they were released; and *Randall*, afterwards, went to *France*, where he has ever since resided. The plaintiff, at the particular request of *Randall*, staid at *Jamaica*, for the purpose of procuring the release of the vessel and cargo, and returned to the *United States*.

Randall, in a letter, dated at *Kingston*, the 24th of *December*, 1796, speaks of the plaintiff as remaining at *Jamaica*, at his solicitation, and as having acted for the interest of the owners, and as being entitled to a "most generous consideration."

An attachment under the act of this state, for giving relief against absconding and absent debtors, was issued against *Randall*, in *November*, 1800; and the present suit was commenced against the assignees, on the 1st day of *January*, 1803.

The judge, at the trial, was of opinion, that a part of the plaintiff's demand was barred by the statute of limitations; and doubted whether *salvage* could be recovered in this form of action. He thought, also, that interest ought not to be computed on so stale a demand. The jury allowed 500 dollars for *salvage*, being one twelfth of the net value of the property recaptured, but allowed no interest.

The following questions were raised for the consideration of the court:

1. Whether the defendants be liable to be sued in this action.
2. If they are liable; whether the statute of limitations is a bar to that part of the plaintiff's demand which accrued prior to six years before the commencement of the action.

*3. Whether the plaintiff is entitled to *salvage*; if so, whether he can recover it in this form of action.

It was agreed, that if the opinion of the court should be

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against the plaintiff on the first question, that the verdict should be set aside, and a nonsuit entered; but if the court should decide in his favor on that point, and against him on the others, the verdict was to be adjusted accordingly. Interest was to be added, in case the plaintiff should be considered as entitled to it.

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T. L. Ogden, for the plaintiff. 1. Are the assignees of the debtor liable to be prosecuted in this action? By the act,† the assignees are declared trustees for all the creditors. From the nature of their trust, and according to the express directions of the statute, they are bound to pay to the creditors their respective dividends out of the effects of the debtor in their hands. That it was the intent of the act that they should be liable, is obvious from the various provisions which it contains. The trustees are empowered to settle all matters and accounts between the debtor and his debtors or creditors, and to take examinations on oath for that purpose.‡ In case of any controversy about such demands, they are authorized to submit them to the decision of referees.§ After the estate of the debtor is converted into money, they are required to call a general meeting of the creditors, at which all accounts are to be fairly adjusted, and the trustees are to proceed to make a distribution among the creditors according to their respective demands.|| If any creditor neglect to give notice of his demand, or refuse to adjust it, he is precluded from a dividend, unless he comply before a second dividend is made.¶

† 1 Rev. Laws,
p. 236. sess. 24
c. 49. s. 8

‡ Sect. 15

§ Sect. 16

|| Sect. 17.

¶ Sect. 19.

It is evident, from the whole tenor of the act, that it confers on the creditor who complies with its requisitions, a right to receive, while it imposes a duty on the trustees to pay him his dividend. In the present case, the plaintiff has done every thing required of him by the act; and it is not pretended that the defendants have not sufficient funds, nor is any excuse offered for their refusal to pay his demand. The trustees are under a legal as well as a moral obligation *to pay, either of which is a sufficient ground to render them liable in an action of *assumpsit*.

†† *Fowler v. Brown*, 1 Exp. N. P. 563.
Cook's B. L. 1. p. 11. 2
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Bl. Rep. 703.
Quantock v. England, S. C.
Burrow, 2628.
Swaine v. Walinger, 1 Str. 746.

The present act differs, in many respects, from the bankrupt laws. The assignees of a bankrupt are merely ministerial, and are only authorized to pay such debts as are proved before the commissioners. In the case of *Brown v. Bullen*, (*Doug.* 407.) it was held that *assumpsit* would lie against the assignees to recover a creditor's share of the dividend.

†† The case of *Hassenclever*, decided in this court, was cited; but from information of counsel, it went no further than to decide that the trustees were not bound to plead the statute of limitations.

2. The statute of limitations takes away the remedy only; the debt still remains due *in foro conscientie*. If the remedy were gone, the direction of the act to the trustees to pay debts would restore it. A debt barred by the statute of limitations, will support a commission of bankruptcy in *England*; and no third person can take advantage of the limitation.†† The statute could no trun in favor of *Randall* after the attachment issued.††

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The trustees were appointed in 1800, and they must have received the money of the debtor to the use of the plaintiff, subsequent to that period. This is the proper test as to the lapse of time. The right of action did not accrue against the defendants until they had funds in their hands. From the year 1796 to that period, the statute clearly could not operate; and from the time when the trustees became liable to pay, to the commencement of the present suit, six years had not elapsed.

3. It may be objected to the plaintiff's claim for *salvage*, that this was not a meritorious service, as it was a rescue from a friendly nation. The general conduct of the *British* cruisers, at that time, towards *American* vessels, was such, as to render recapture beneficial to the owners, and meritorious in the recaptors. But as the owner was on board, and approved of the rescue, it is not for him to make this objection.† If the recapture was unlawful, the risk was so much the greater, and enhances the claim of the plaintiff to his reward for a dangerous service, performed at *Randall's* request. Again, it may be said, that the rescue was a part of the ordinary duty of a master, and does not entitle him to this extraordinary compensation; but the master's duty terminated with the capture; he was not bound to attempt the *rescue.‡ The owner, as he directed and approved the service, is estopped from saying it was not lawful nor meritorious.§ Besides, in his letter, he acknowledges that the plaintiff is entitled to a liberal compensation.

As to the form of action: a salvor has a *lien* on goods saved, and may retain them until he has received a reasonable compensation, and may maintain *trover* for them.|| If his *lien* is gone, he may have an action against the owner. The remedy is both in *rem et personam*. In the case of *Newman v. Walters*, (3 *Bos. & Pull.* 612.) which was an action of *assumpsit*, it was decided, that a passenger who had saved a ship deserted by the master, was entitled to receive salvage in an action against the owner. The demand, in the present case, is not more uncertain than such as are usually made for a compensation for work and labor, the amount of which, in actions of *assumpsit* on a *quantum meruit*, depend on similar considerations as to the labor, risk or value of the service performed. The interest is undoubtedly a proper charge on all the *items* of the account, except, perhaps, that of salvage.

Harison, for the defendants. It is a general principle, that trustees can never be made personally responsible, except for their own individual acts. If trustees take possession of the goods, or sell and convert them into money, they are liable in respect to the goods or money so received. They can never be sued on the original contract of the person whose property is thus put into their hands. It is for their own contracts only that they can be made answerable. In the present case, no

† 1 *Rob. Adm. Rep.* 277. *The Two Friends*.

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‡ *Emerigon*, tom. 1. p. 506.

§ 1 *Rob.* 278.

|| 1 *Ld. Raym.* 393. *Hartford v. Jones, Abbott*, 783. 3d ed. 8 *East*, 57.

debt has ever been proved or established by the plaintiff, nor has any dividend been declared, which could entitle him to sue for his share of the fund. The trustees, it is true, are empowered to settle accounts, and do certain acts; but they are not obliged to perform them. They have decided upon this demand. And if the plaintiff wants a remedy, he should apply to the Court of Chancery, which is the proper tribunal to take cognizance of his claim, and can award a feigned issue to try the validity and amount of the demand. No precedent can *be found of an action against trustees on the original contract. A court of chancery is the proper *forum*, as to all questions relating to trusts.

If the present form of action can be sustained, the trustees would be made liable, out of their own estates, to the full amount of the plaintiff's debt. The case cited from *Douglas* is not applicable to the present; there the plaintiff had proved his debt, and a dividend had been declared. Indeed, it seems to be agreed on all hands, that no action can be maintained, until a dividend is declared. The trustees cannot be made liable for more than they have actually received. In an action for money had and received, the whole circumstances of the case may be fully investigated, and the plaintiff can recover no more than his share, or what may be considered as received to his use.

2. Some of the *items*, as the claim of salvage, are within six years; but the verdict is given for the whole amount. To save the whole of this claim from the operation of the statute, it should appear to be an account current between merchant and merchant, where there are mutual *items* of account; but here all the *items* are on one side, and the statute runs against all of them, except the charge of salvage. The statute begins to operate as soon as the party is within the jurisdiction of the state, and if he afterwards absents himself, that cannot be urged in favor of the plaintiff; it is his own fault if he do not commence his suit the first opportunity. After their return from the first voyage, both parties were within the state, and all demands prior to the second voyage are clearly barred. The creation of a trust in the defendants cannot defeat the operation of the statute. Where the statute once begins to operate, it runs over all intermediate acts, and the bankruptcy of the defendant does not prevent its effect. (1 *Strange*, 556. *Gray v. Mendez*. 1 *Wilson*, 134. *Smith v. Hill*. 4 *Term Rep.* 306. *Durour v. Jones*. *Buller N. P.* 159. 4 *Bac. Abr.* 479. in note, *Guillim's* edition.) If bankruptcy does not hinder the operation of the statute, *a fortiori*, it cannot be defeated by a trust like the present. The case of *Hassencleaver*, formerly decided *in this court, went no further than to say that the assignees were not compelled to plead the statute, and is a case more in favor of the defendants than against them.

3. Another *item* of the account is for salvage. As the right

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of search is admitted, it follows as a necessary consequence, that it is the duty of the neutral to submit to the examination. This is, unquestionably, the safest rule. Individuals should not be permitted to take upon themselves the vindication of national rights, but leave them to the protection of the government. The rescue, or attempt to rescue, is an illegal act, which renders the property liable to confiscation; instead of being beneficial, it is injurious to the owner, by exposing his goods to the risk of condemnation. To entitle the party to salvage, the service should be both lawful and meritorious.

From the facts in this case, it does not appear that the property ever arrived in safety. If, after the rescue, the goods never arrive, there can be no claim to salvage, for it would be carrying the doctrine a great way, to say, that a party was entitled to salvage, for an unsuccessful attempt. The language of the parties in this case, is, If my property be saved by you, and come to my hands, I will give you a portion as a compensation for your services. Salvage does not rest on the common implied contract of a *quantum meruit* for labor performed. It is an extraordinary recompense, founded on the fact that the goods have been saved, and brought again into the hands of the owner.

D. B. Ogden, in reply. The language of the act is imperative as it regards the trustees, and they are bound to perform the duties prescribed; and having, in the present case, failed to do so, the plaintiff is entitled to his action against them. No objection was made at the trial, that the defendant had no funds, out of which the plaintiff could be paid. If the trustees did not intend to be answerable on the original contract, they should have pleaded specially, that they had paid over all the money of the debtor which had come to their hands, as in the case of executors or administrators.

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*The trustees are bound to pay all just demands. If a man devises that all his *just* debts shall be paid, this includes those barred by the statute, as well as other debts. Part of the present demand arose in *August*, 1800. The attachment issued in *November*, 1800, at which time the statute had not begun to run. According to the act, no trustees could be appointed, until after the expiration of one year. The principle of limitation is founded on the idea of *laches* in the plaintiff;† but here no *laches* can be imputed to him, for there was no person against whom he could bring his action. If there be no executor or administrator against whom the party can bring his action, he shall not be prejudiced by the statute.‡ If, therefore, one year be deducted, there will remain but five years and five months, from the time the right of action first accrued, to the commencement of the present suit. Part of the plaintiff's demand is for services performed from 1796 to 1797, and though some of them be within the statute, yet the services

† 1 *Black. Rep.*
354. *Fenton v.*
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‡ 4 *Bac. Abr.*
470. *Gwillim's*
edition.

being continued, the end of the period is the point at which the time ought to begin. If, as in the case of running accounts between merchants, one item of credit be such an acknowledgment of an unsettled account, to take the whole out of the statute; for the same reason, the continuance of the plaintiff in the service of *Randall*, from day to day, should have a similar effect. Again, the flour was sold on a credit for bills on *France*; at what sight does not appear, but, according to the usual course of business, they could not be paid under four or five months from their date; and allowing this time in the computation, the demand will be saved. It appears also, that *Randall* has not been in this state since *August*, 1796, and has received the proceeds since that time. He could not, therefore, be sued since the plaintiff's right of action accrued.

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A debt, though barred by the statute, remains binding on the conscience of the debtor,[†] and it is to be left to his conscience whether he will avail himself of the statute or not. It may, perhaps, be worthy of consideration, whether the privilege of making such a plea is not to be confined to the *party himself or his immediate representatives, and not to be extended to third persons appointed by law, over whose consciences the plaintiff can have no influence. (a)

† *Trueman v. Fenton, Comp.* 548.

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3. *Salvage*, strictly speaking, is a compensation allowed by law to strangers, for saving the property of another, not under their care. It is intended as an inducement to engage persons in the execution of a service, which they are under no obligation to perform. It is not pretended, that the master and seamen are entitled to salvage for preventing the loss of either vessel or cargo, confided to their care; and if the rescue in this case could be shown to be a part of their duty in relation to the property, there would be an end of the question. The policy of the law has provided a sufficient inducement for their exertions, in making their wages depend on the preservation of the ship and cargo, or in other words, the earning of freight. But it was the duty of the master and crew of the *Romp* to submit to the search and detention, since resistance would have been unlawful. (b) After the capture, and while the property was in possession of the *British*, there was an end of their ordinary duties. As rescuers or recaptors, they may be considered as strangers, performing an extraordinary service, at great risk, and for the benefit of the owner. On the arrival of the vessel at *Aux-Cayes*, she came into possession of the owner; and the plaintiff's right to salvage was perfect, and could not be defeated by any subsequent act of *Randall*, in relation to the property.

(a) This idea seems to be countenanced by the expressions of Lord Mansfield in the case of *Quantock v. England*, 5 Burr. 2628, and 2 Black. Rep. 702. See also the reasoning of the judges in the case of *Bickridge v. Bolman*, 1 Term Rep. 405.

(b) See 5 Rob. Adm. Rep. 232. *The Catharine Elizabeth*.

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KENT, Ch. J. The first question is, whether the defendants are liable to be prosecuted in this action.

The court, in which the proceedings under the absconding debtor act are pending, has an equitable jurisdiction over all claims between the trustees on the one hand, and the debtor and creditors on the other. This jurisdiction is given by the 27th section of the act (sess. 24. c. 49.) which makes "the trustees subject to such order for the more effectual execution of the act, as shall be made in the court of which the person appointing them is judge." It was in pursuance of this power that the court ruled, in *The case of *Cascaden*,^(a) (October term, 1800.) that trustees were liable to account, on the application of either debtor or creditor; and in *The case of the Trustees of Couenhoven*, (January term, 1803,) that they were entitled to apply for advice, as to making dividends, on due notice being given to the creditor whose account was in question. The trustees very much resemble commissioners under the *English* bankrupt laws, since they are to liquidate all demands, and declare, as well as pay, dividends; and the practice in *England* is for the creditor to apply to the Court of Chancery for assistance in obtaining his dividend. (1 *Atk* 90.) The only instance, perhaps, in which a suit at law has been sustained, even against the assignees of a bankrupt, is where the creditor's debt has been proved, and a dividend declared by the commissioners, and a refusal on the part of the assignees to pay it. In that case the dividend had been considered as so much money in the hands of the assignees for the use of the creditor, and an action at law was sustained for it. (*Brown v. Buller*, *Doug.* 407.) But the present is an action against the trustees before the demand has been adjusted, and without proof of any dividend having been declared. I am induced to think that the plaintiff has mistaken his remedy, and that he ought to have applied by petition to the equitable powers of this court, to coerce the defendant into an adjustment of his demand, and to account. The special provisions in the statute are inconsistent with a right to sustain the present action, and it would derange the whole order and system of those provisions. Demands not yet due are provable and payable, upon a rebate of interest; and debts not proved at the two meetings appointed by the trustees for that purpose, are barred from the benefit of a dividend. Other difficulties may be suggested which would embarrass a general right in the creditor to proceed against the trustees, by the common law process, all of which may be avoided by confining the creditor to the remedy prescribed by the act.

But the next question is, whether we ought not now to proceed to give our advice and direction, upon the case as before us. We have the merits of the plaintiff's claim, and we have

(a) Since reported. 2 *Johns. Cas* 107

a verdict ascertaining the matters of fact; and the *defendants have, at this very term, applied to us, by petition, for direction in respect to their trust. I see no difficulty in taking up the case, and making such order as the nature of it shall require.

A point then that arises is, how far the statute of limitations is a bar to the *plaintiff's demand. The defendants have thought proper to insist upon it, and I see no reason why they may not avail themselves of it, equally as if their principal was himself the defendant. In the case of the *Assignees of England v. England*, (5 Burr. 2628. S. C. 2 Black. 702.) it was admitted that the bankrupt might object, that the petitioning creditor's debt was above six years old, though after the commission granted, a third person could not raise such an objection to defeat the commission. The trustees succeed to the rights of their principal, and, consequently, to his means of defence.

The demands of the plaintiff arising on the second voyage, are clearly not affected by this plea, as the debtor has not been within this state, since those demands accrued. The right of action for demands existing prior to *August*, 1796, was placed under the operation of the statute of limitations, as the parties were then within this state. It does not appear when *Randall* received payment from the *French* government of the bills of exchange drawn upon it in the summer of 1796, for the 20 barrels of flour belonging to the plaintiff. As the plaintiff and *Randall* were then together, and acting together in a joint concern, it may be presumed, that the flour was sold and the bills of exchange received in payment by *Randall*, with the knowledge and consent of the plaintiff; and unless those bills were paid before the *August* following, there is no color for the plea on any ground, because at that time no money had been received to the use of the plaintiff. This money may, or may not, have been received; and I think it was incumbent on the trustees to have shown, affirmatively, that the money was received before that time, and in the hands of their principal. They set up the statute, and they must show that it applies. The plaintiff calls upon them to account for the proceeds of these 20 barrels of flour; and to protect themselves under *the statute, they must show that *Randall* had the money in *August*, 1796, when he was last at *New-York*. They have not done this, and the facts in the case are not such as to require us to presume that the money had been received, as early as at that period.

The services of the plaintiff upon the first voyage stand upon a different ground. They had been rendered before *August*, 1796, and for any thing that appears to the contrary, the plaintiff was then entitled to payment for them. The general rule is, that when the statute of limitations once begins to run, it continues to run, notwithstanding any subsequent disability. The exhibition of the plaintiff's claim to the trustees

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in *December*, 1802, may be considered as equivalent to the commencement of a suit, and so it ought to be, since an action at law will not lie against the trustees. The six years had, however, expired in *August*, 1802, unless something had previously occurred to arrest the progress of the statute, and I know of nothing that could do it. The plaintiff was not prevented by any disability, from suing *Randall*, in *August*, 1796; and the statute consequently, then commenced to run, and the absence of the debtor, afterwards, would not impede it. The plaintiff was always at liberty to sue out process against the debtor, and continue it down on the roll. According to the established exposition of the statute of limitations, I am of opinion that the demand of the plaintiff, as to his services for the first voyage, was barred by the statute, when he exhibited his claim, in *December*, 1802.

Another question in the case, is respecting the demand for salvage.

This is a grave question, considering the circumstances under which it is presented. Here was a rescue by force, not from an enemy, but from a friendly power.

Randall, the owner of the vessel and cargo, took the law into his own hands, and violated his neutral duty; for he was bound to have submitted to a judicial inquiry. (a) He would have been entitled to costs and damages, if the seizure and detention had been unjust. Whether they were so or not, I am not now to inquire. In judgment of law, such a rescue was not beneficial, but injurious to the property, as it exposed it to condemnation from the very act of rescue. The general rule of maritime law is, that salvage is not due on recapture of neutral property; and the rule is founded on the supposition that no service is rendered, and on the presumption that a neutral carried in by a belligerent for examination, being in no danger, receives no benefit from recapture. (1 *Cranch*, 36. *Talbot v. Seeman*.) This rule was relaxed by the *British* Court of Admiralty during the last war, in respect to neutrals captured by *French* vessels, on the ground, that a signal benefit was conferred on the neutral, by rescuing him from the irregular and rapacious decrees of the *French* tribunals. (b) In the present war, however, the exception seems to be abandoned, and the general rule of the law of nations acquiesced in and enforced. (*The Carlotta*, 5 *Rob.* 51.) Whatever reason there might have been for the exception, in the instance referred to, there existed no sufficient reason in the autumn of 1796, in respect to a *British* capture, to withhold the application of the general rule. If, therefore, *Randall's* vessel and cargo had been lawfully recaptured from the *British*, he would

(a) 5 *Rob. Adm. Rep.* 232.

(b) See 4 *Rob. Adm.* 157, 158. 6 *Rob. Adm. Rep.* 108, 109. See also the case of the *Sansom*, 6 *Rob. Adm. Rep.* 410. salvage allowed on a vessel recaptured, on the presumption of a condemnation in *France*, under the *Berlin* decree of the 21st November, 1806.

nave been entitled to restitution without payment of salvage ; but being unlawful and tortious, there is not, under any circumstances, a just ground or claim for salvage. The illegality of the rescue will not be questioned, for that would be to deny the right of visitation and search, and to justify resistance to it ; it would be to deny the right of carrying into port for inquiry and examination, and to justify resistance to that act also. Right and duty are reciprocal, in this case. The right to search and the right to carry in, necessarily imply the correspondent duty to submit. (a) If *Randall* was justifiable in his rescue, then it would have been lawful for any other *American* vessel that should have met him, to have rendered him assistance ; a proposition leading directly to public hostilities, and too untenable to admit of a serious consideration. If the rescue was unlawful, no claim for salvage can be deduced from it ; and for this we have the authority of the Supreme Court of the *United States*, in the case of *Talbot v. Seeman*. (1 *Cranch*, 28.) **"To support the claim for salvage,"* says the chief justice, in giving the opinion of the court, *"the taking must be lawful ; for no claim can be maintained in a court of justice, founded on an act in itself tortious. On a recapture, made by a neutral power, no claim for salvage can arise, because the act of retaking is a hostile act, not justified by the situation of the nation to which the vessel making the recapture belongs, in relation to that from the possession of which such recaptured vessel was taken. No right can accrue from an act in itself unlawful."*

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The plaintiff was a *particeps criminis* with *Randall*, in the rescue, and the law will not raise an assumption in his favor. There is nothing in *Randall's* letter annexed to the case, that contains any recognition of his services, in respect to the rescue ; and if it had contained any promise of compensation for that service, I should be inclined against its validity, as being founded on an illegal consideration.

I am, accordingly, of opinion, that the plaintiff's claim for salvage, and for his services, as master, on the first voyage, ought not to be allowed ; and that his claim for the proceeds of the 20 barrels of flour, together with interest on the same, from the receipt of the money by *Randall*, and his claim for services on the second voyage, but without interest on such claim, as the same was an unliquidated demand, ought to be admitted. Each party ought to bear his own costs arising on the suit, as it was a case of mutual mistake ; by the plaintiff in commencing the suit, and by the defendants in suffering it to proceed under a plea to the merits.

Having thus settled the questions between the parties, if any difficulty should arise as to the liquidation and payment of the

(a) See *Peters's Adm. Decis.* 339. note. *Salowet v. Johnson*, 2 *Park*, 498. 6th ed. ; but see *Garrells v. Kensington*, 8 *Term Rep.* 230. *Marsh. on Ins.* 2d ed. 436—448. 2 *Azum's Maritime Law*, part 2. c. 3.

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LIVINGSTON, J. I concur in the opinion just delivered, except so far as it relates to salvage.

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The owner being on board, and the recapture effected with his concurrence and at his request, should preclude all inquiry as to its legality, or whether any benefit were conferred *on *Randall* by it. But it is supposed that the master's duty being to submit to be carried in, he was guilty of a tortious act in taking the vessel and cargo out of the hands of the captors. The case of *Talbot* and *Seeman*, in the Supreme Court of the *United States*, has been cited as in point against the present demand; but, with me, this decision is a strong and conclusive authority the other way. Though *Hamburg* and *France* were at peace, and though the *Amelia* was recaptured, without any request of its owners, Captain *Talbot* was allowed salvage, because of the danger the neutral vessel run of an unjust condemnation. Will any one undertake to say that the *Romp* was in no danger? Or have we already forgotten the many violent condemnations of neutrals, which took place in the *British*, as well as the *French*, *West Indies*, during the last war between *England* and *France*; the consequent high premiums for insurance of neutral property; the reiterated complaints of our merchants, and the remonstrances of our government?

Were a belligerent, in his conduct towards a neutral, always to respect the law of nations, there would be no great danger from his being carried into port; but when neutral property is subject to confiscation, on the most frivolous pretences, and while admiralty courts are governed by the most arbitrary instructions, or *arrets* of their sovereign, it is a compliment which I am not willing, under such circumstances, to pay to any nation, to say that a liberation, with costs and damages, would certainly have taken place on the same ground. Sir *William Scott* allows salvage on the recapture of neutral property from the *French*; and the asperity with which the learned judge remarks on the unjust decrees of the governing powers of *France*, and the rapacious conduct of its maritime tribunals, might, without any violent outrage on truth, have been applied to the vice-admiralties of his own country, and to some of the orders under which he himself has sometimes been compelled to act.

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But it is enough for me that *Randall*, who was the best judge, thought there was danger. If the master of the *Hamburg* had requested Captain *Talbot* to retake him, I do not believe the Supreme Court *would have had heard an argument on the subject; nor were *Randall's* fears imaginary, for we afterwards find this very vessel again in the hands of the

British, and himself complaining very bitterly, in a letter to a friend, of great delays, and the little prospect he had of being acquitted. "At present," says he, "I have no sanguine hopes of a decree in our favor, notwithstanding a new judge is appointed; the former one sought every excuse for a condemnation, and was supposed to be under the influence of the agent of the navy." He concludes his letter with observing, that he thinks "*Peck* entitled to his most generous consideration;" yet we do not hesitate to say, as if we were better acquainted with his concerns, that *Peck* has rendered him no service at all, but that he deserves to be punished as a wrong doer, in rescuing a vessel which, if the truth were known, ought perhaps never to have been taken out of its course. I must confess, I feel no inclination to discourage these enterprises on the part of our mariners, which are generally considered as meritorious, and are often rewarded by underwriters. "When the lawless and irregular practices" of belligerents towards neutrals, which Sir *William Scott* speaks of, shall cease, it will be time enough to deny salvage for the liberation of neutral property. Upon the whole, I have no doubt, that, whatever might have been the case, if the recapture had been made in *Randall's* absence, we ought not now to permit him to say that he has not been benefited by it. It was enough he thought there was danger, and that the captain might have been injured by the attempt. The right to salvage became perfect in my opinion, on the safe arrival of the *Romp* at *Aux Cayes*, though she was afterwards captured in attempting to go to another port.

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TOMPKINS, J. I concur in the opinion delivered by the chief justice, excepting as to the costs. As the plaintiff has resorted to an action, which cannot be maintained upon legal principles, it appears to me, that payment of costs, by him, is a natural consequence; otherwise, I am at a loss to know by what form of judgment upon the record, the defendants can avail themselves of our decision. The plea of *the general issue ought not to prejudice them here, because they might have intended to avail themselves of the insufficiency of the declaration, by motion in arrest of judgment, or upon writ of error. I am not disposed to subject the trustees to personal responsibility for costs, where a creditor has thought proper to harass them with a suit which cannot be maintained; on the other hand, to award costs, payable out of the estate of the absent debtor, is an infringement of the rights of third persons. The dividends of other creditors, who may have proved their debts in the manner prescribed by the statute, will be diminished by paying to this plaintiff out of the fund, a bill of costs, accrued in consequence of his misconception of his remedy. I am, therefore, of opinion, that the defendants ought to recover costs against the plaintiff.

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Judgment for the plaintiff, *ut supra*.

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Insurance on the cargo of a vessel, at and from New-York to a port or ports in the island of Cuba, and thence back to New-York. The policy contained the usual clause, to be free from any loss arising in consequence of

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illicit trade, &c. The vessel arrived at *St. Jago de Cuba*, her port of destination, but was not allowed to enter there, and after waiting 20 days, sailed for another port in the island, in going to which she met with averse winds, that drove her into the *Bite of Logane*, and for fear of the *Brigand* boats, she went into *Port Republican* in *St. Domingo*, where the cargo was forcibly taken out, and sold at a great loss. On receiving advice of this circumstance, the insured abandoned for a total loss, and in their letter assigned as a cause, that the vessel had been refused an entry at *St. Jago*, and that the voyage was thereby defeated. It was held, that the denial of entry at *St. Jago* was not a loss within the policy; but as to the effect

THIS was an action on a policy of insurance, on the cargo of the sloop *Mason's Daughter*, at and from New-York to a port or ports in the island of Cuba, and from thence back to New-York. The policy was underwritten on the 7th January, 1802, for the sum of 12,000 dollars, at a premium of 5 per cent., and expressed to be on goods out, and on merchandise or specie, or both, home. It contained also, the usual printed clause, "to be free from any loss which may arise in consequence of a seizure or detention for, or on account of, illicit or prohibited trade." The loss was stated specially in the declaration: "That the vessel arrived at the *Moro Castle*, in the island of *Cuba*, on the 1st February, 1802, where she was necessarily detained until the 24th day of the same month, and the said sloop was, by certain persons exercising authority there, and unknown to the plaintiffs, prevented from prosecuting her voyage to *St. Jago de Cuba*, for which she was destined; that she afterwards departed from the *Moro* for *St. Juan Los Remedios*, another port in the same island, and while proceeding for that port, was by violent storms, gales of wind, &c., forced and driven into *Port Republican*, in the island of *Hispaniola*, where the said vessel was, by certain persons unknown to the plaintiffs, and exercising authority at that place, prevented from further prosecuting her voyage to the said port of *St. Juan Los Remedios*, or any other port in the island of *Cuba*, and the goods there, by the said persons, were forcibly unladen and taken out of the possession of the plaintiffs, and against their will and consent; by which means, and by other unavoidable accidents and misfortunes, that happened to the said vessel and the said goods, and by perils insured against, in and by the said policy, the goods became and were totally lost to the plaintiffs."

The cause was tried before Mr. Justice *Tompkins*, at the *New-York* *Sittings*, on the 19th day of *December*, 1804. The following are the material facts which appeared in evidence on the trial. The *Mason's Daughter* sailed from New-York on the 12th January, 1802. The master, who was the consignee, was ordered by the plaintiffs to proceed first to *St. Jago de Cuba*, and there dispose of such part of the cargo as could be sold to advantage, otherwise to proceed to the north side of the island, to the port of *St. Juan Los Remedios*, and there sell the residue, or, in case it could not be sold there, to go to *Matanzas*, on the same side of the island. The master was furnished by the plaintiffs, with a *passport* from the president and intendant at *Havanna*, certified by the *Spanish* consul at

New-York, the 11th *January*, 1802, and who testified on the trial, that this was the first he had granted out of four, among those that had been furnished to him by the governor of *Cuba*. On his arrival *at the *Moro Castle*, the master applied to the chief officer of the customs, who, after inspecting his papers and passport, directed him to apply to the governor, who, on examining the papers, gave his opinion that the vessel might be permitted to enter. He returned with the papers to the officer of the customs, who referred him to another superior officer, who, after examining the passport, said it was not sufficient to authorize an entry, on account of its date; and that he had positive orders not to permit any *American* vessel to enter, under similar circumstances. As the governor and the other officer were of different opinions, the master, by advice of a merchant there, was induced to wait about twenty days, in hopes of being allowed to enter. Being disappointed, he set sail with a view to go to *St. Juan Los Remedios*, but meeting with adverse winds, he was forced into the *Bite of Leone*; and being afraid to anchor in the *Bite*, on account of the *Brigand* boats which infested that place, he thought it prudent, with the advice of the crew, to go into *Port Republican*, until the wind should be favorable for proceeding to *St. Juan Los Remedios*; but he was not allowed to depart from *Port Republican*, and was compelled, by the authority of the place, to land his whole cargo, and sell it at the price that was offered, and at a great loss. It was proved, that several *American* vessels had been permitted to enter at *Matanzas* with similar passports; and that another *American* vessel had been allowed to enter at the *Havanna*, in *February*, 1802, without any passport or other paper from the *Spanish* consul.

On the 3d *April*, 1802, the plaintiffs addressed a letter of abandonment to the president of *The Marine Insurance Company*, informing him, that they had received "advice from the master of the *Mason's Daughter*, dated at *Port Republican*, the 17th *March*; that presuming he was not permitted to enter at *St. Jago de Cuba*, the place of destination, they considered the object of the voyage defeated, and therefore they abandoned," &c.

It was agreed by the counsel for the parties, before the trial, that the jury were not to be troubled with calculations, *and that in case the plaintiffs recovered, the parties would adjust the accounts between them.

It appeared to be the practice of the defendants, in cases of claims for losses, to deliver the papers to a Mr. *Ferrers*, their agent, to calculate and adjust the amount; and a paper, signed by him, was produced in evidence, on which an account of the loss and the amount was stated.

The judge charged the jury, that if they thought the stay at *St. Jago de Cuba* reasonable and proper, and that the vessel was actually forced by adverse winds into *Port Republican*,

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of a denial to trade, if the voyage insured had ended there, *dubitatur*. In making his abandonment, the insured must assign the true cause. If he assign an insufficient cause, he is bound by it, and cannot avail himself of a subsequent event, without a new abandonment.

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and that the going there was *bona fide*, for greater safety, these circumstances would form no objection to the plaintiffs right to recover; and that if they believed that the cargo was taken out, and ordered to be sold by the public authority at *Port Republican*, the plaintiffs would be entitled to recover for a total loss. But that they might find either for a total or a partial loss, as they deemed right, or they might find a general verdict; and, in either case, the amount would be adjusted by the parties, according to their agreement for the purpose.

The jury found a verdict for the plaintiffs, for 14,310 dollars, subject to deductions, by the agreement of the parties.

On the motion to set aside the verdict, the following points were insisted on by the defendants' counsel; 1. That the plaintiffs could not recover for any other cause than the supposed loss, by reason of the vessel's having been refused an entry at *St. Jago de Cuba*; 2. That, from the evidence, the plaintiffs were not entitled to recover even on that ground; 3. That no judgment could be rendered on the verdict as found.

Benson, for the defendants. Two events are stated in the declaration as the ground of the plaintiffs' claim to recover for a loss within the policy; 1. The refusal to permit the vessel to enter at *St. Jago de Cuba*; 2. The forcible restraint at *Port Republican*. The first event is not within any of the perils described in the policy; and to entitle the plaintiffs to an indemnity on that ground, there should have been a special provision in the policy to that effect. The prohibition against entering at *St. Jago* may be the misfortune *of the assured, but it is not a peril for which the assurers are liable. The vessel was turned away, because her passport was not regular, or for some objection to the date; but it is the duty of the assured to be provided with all regular papers, adequate for the prosecution of the voyage. If the voyage has been lost for this cause, the failure must be imputed to the plaintiffs. After the refusal of a permission to enter, the master staid three weeks, waiting for a change of opinion in his favor. Admitting that he acted with good intention, this useless delay, in law, amounts to a deviation,† and the insurers are not answerable for its consequences. He ought to have left the *Moro* immediately after the refusal to enter, and not have waited with illusive hopes, suggested by his own wishes, and not founded on any rational calculation.

The vessel, with the papers she had on board, could not have been legally admitted into a *Spanish* port, and must, therefore, be considered as inadmissible into any port in the island. The royal instructions or orders are, in this respect, the law. The master, however, sailed with a view to go to *St. Juan Los Remedios*, and from thence to *Matanzas*, to seek an entry. This, according to the policy, he had no right to do. The insurance is from port to port, to a market which is

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† *Marshall*, 170.
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different from going to find an entry with a bad passport. The cause of the abandonment is the refusal to allow the vessel to enter at *St. Jago de Cuba*. The insured are not bound by an abandonment, unless it be accepted, and they may revoke it. If accepted, the property is transferred. When nothing is said on the part of the insurer, the question at whose risk the property is afterwards to remain, must be determined by deciding on the right to abandon at the time. Here, the event having happened, and the insured having abandoned, he must abide by his own act; and if it be decided that he had no right, the property must be considered as remaining at his own risk.

The declaration, in this case, is for a total loss, and yet the proof shows only a partial loss, the extent or amount of which does not appear. If the court should be of opinion *that the plaintiffs are entitled to recover for a partial loss only, there must be a new trial to ascertain its amount. The verdict is informal, and a mere nullity. It cannot be corrected here. The cause ought to be sent back to another jury, when the defendant may have an opportunity of demurring to the verdict. The agreement of the counsel meant no more than that if the plaintiff recovered for a total loss on the abandonment, the parties would adjust the amount between them. This is not a verdict taken by consent.

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Radcliff and *Riggs*, for the plaintiffs. This is an insurance out and home, and to one or more ports in the island of *Cuba*. The privilege of going from one port to another is not strictly confined to the purpose of trading. The trade with the *Spanish* colonies, though generally illicit, is frequently permitted. Sometimes it is open at one place, and shut at another. Entries by other vessels were, in fact, made in the same month. It is important, therefore, on such a voyage, that the insured should have the right of going to various ports, and it is immaterial whether the policy express that he may do so, for the purpose of seeking an entry. He is justified, under the general permission, to go from port to port, in the hope of being allowed to enter. The nature and course of trade with the colonies of *Spain*, is well known, both to the insurers and insured. If the court take notice of the laws of a foreign country, they will also take notice of the restrictions, suspensions or exceptions which may, from time to time, exist. If the insurers will knowingly insure a trade to the *Spanish* colonies, they must be considered as insuring all legal and proper attempts to enter for that purpose, though they are not answerable for any illicit or improper conduct. The denial of entry at *St. Jago de Cuba* is not the sole ground on which the plaintiffs claim a total loss, but so far only as it is connected with all the consequences of that refusal. But even that fact alone would be sufficient; for as the master was thereby compelled to seek another port, it may be considered as the real cause of the loss which hap-

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pened. There can be no objection as to the vessel's papers. It is *enough that she had all the documents required by the laws of the *United States*, for an *American* vessel. The *Spanish* passport was an unnecessary, harmless paper; and whether valid or not for the purpose for which it was granted, is perfectly immaterial. The *Spanish* consul thought it useful and effectual.

An unreasonable delay, it is true, will amount to a deviation; but it is a question for a jury to decide, whether the master's conduct be proper, *bona fide*, and reasonable. They have found it to be so in the present case, and their decision is conclusive as to that fact. It is not denied, that, after an abandonment, the recovery must depend on the right to abandon, as determined by the court. The insured is not bound to revoke his abandonment, but may recover according to his proofs. A total loss is to be understood, either in its natural or legal sense. This may be considered as a technical total loss, by the refusal of the permission to enter at *St. Jago*, and as continuing, so as to support the abandonment; or as an actual loss of the goods insured, as the plaintiffs were divested of their property by a *superior* power. For, though the goods were sold, afterwards, it was against the will of the master, who had no dominion or control over them. The abandonment was made on the letter of the 17th of *March*, written at *Port Republican*, and not upon any previous information from *St. Jago*. The right to abandon for the event which happened at *Port Republican*, being unquestionable, if the plaintiffs have in their letter assigned another and insufficient cause, it will not affect their right, as long as there was a valid cause existing. The conduct of the master, in going to *Port Republican*, appears to have been *bona fide*, the result of necessity, and for his self-preservation.

[THOMPSON, J. Does it appear that this letter was written by the master, before or after the seizure of the goods?

Radcliff. It must have been after the seizure, for it was dated near a fortnight after his arrival.]

Here, then, is not a mere technical total loss, but an actual total loss of the property, which was taken by force from the *possession of the plaintiffs, and has never been returned to them: so that the loss has continued total to the present day. It has been repeatedly decided,† that an abandonment is not essential, if the loss be actually total, and continues so to the bringing of the action, or to the time of trial.

Why did the defendants refer the case to their agent, Mr. *Ferrers*, to calculate the amount of the loss, if they did not mean to pay? The account exhibited by him clearly shows, that his calculation was made on the basis of a total loss. The charge of the judge ascertains what was understood to be the agreement of the parties. And the verdict of the jury was clearly for a total loss. But if there is any doubt or uncertainty

† 2 *Caines*, 208.
Lawrence v. Ebor.

the court ought, under this agreement, to correct the verdict, and not grant a new trial.

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Hoffman, in reply. Though Mr. *Ferrers* be the agent of the defendants, to state the amount of losses in cases referred to him, yet his reports are not conclusive on the insurers. If, however, from the whole case before them, the court have sufficient *data* on which to give judgment for a partial loss, the verdict ought to stand: but the verdict furnishes no means of such a calculation. The rule of calculation is the invoice price of the goods, compared with the net proceeds at *Port Republican*, and not on the return cargo. It does not appear, from the case, at what time the sale was made. If the insured mean to found their right to recover on the abandonment, they must show clearly, that on the 3d of *April*, 1802, the cargo had been forcibly taken and sold, otherwise no right to abandon, even on that event, existed. But the cause of abandonment assigned is not the forcible sale of the goods by a superior power, or any perils of the sea, but merely a refusal of entry at *St. Jago de Cuba*. In every view, this case presents difficulties not easily to be surmounted. Two questions are to be considered; 1. Does the assurer take upon himself to assure the entry of the vessel into a port? 2. Can the assured, after assigning one cause of abandonment, assume another, and recover for a different cause?

*1. The most analogous case is where the port of destination in the policy is blockaded; but it has never yet been decided that the insured is entitled to abandon, because his vessel has been turned away from a blockaded port.† If the defendants are not responsible for the refusal of entry, they are not answerable for any of the consequences of that refusal. But the assured undertake for the legality of the trade. Why was this vessel denied an entry? Because it was illegal. Now, by the terms of the policy, the defendants are not responsible for any illicit trade.

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† But see the case of *Schmidt v. The United Insurance Company*, post, 249

Again, in case of a legal trade, an unreasonable delay would amount to a deviation. In the present case, knowing the trade to be illegal, the master, after the first refusal, ought not to have waited a day, with the view to gain admittance. It is true, the policy allows him to go from port to port; but this privilege cannot be extended to a permission to stay at a particular port, upon a speculative probability of gaining admission. Suppose, after laying off the harbor for that purpose, two or three weeks, the vessel had been lost by the perils of the sea, would not the loss have fallen on the assured? His conduct here ought to be subject to a stricter rule than in cases of delay arising in the prosecution of a legal trade. What shall be considered as a reasonable delay, is not a mere question of fact, but is to be determined by the court.

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2. In the policies of insurance used in this city, there is a peculiar clause, that the loss is not to be paid until thirty days after proof thereof. This was introduced for the purpose of giving the insurer time to deliberate on the abandonment, and to decide whether he would accept it or not, as well as to inquire into the fairness of such loss. But if the assured could in his abandonment assign one cause of loss, and, afterwards, recover for another and different cause, this clause would be, in a great measure, nugatory. Any investigation of the facts would be useless, if other facts might afterwards be adduced to support the abandonment. The letter of the 3d April, alleges no other ground, but the refusal of entry at *St. Jago de Cuba*. If the plaintiffs meant *to rely on a different event, it ought also to have been mentioned, that the insurers might have had an opportunity to consider it, and to determine as to their acceptance of the abandonment. As an abandonment is requisite to vest the property in the insurer, and to enable him to take measures for its preservation, it is essential that the true situation of the property, or cause of abandonment, should be made known. Every fact should be disclosed that would enable him to elect his course of proceeding, in regard to the property; for as long as the thing is in existence, there is a hope and a chance of recovering its possession. And this is equally necessary, though the property may have been converted into money, by a sale.†

† *Park*, 172
Marshall, 498.

[It was asked by one of the counsel, whether the *debenture* was to be deducted from the amount insured; and the court said, that it had been decided in the case of *Gahn & Mumford v. Broome*, July term, 1799,‡ that the *debenture* was not to be deducted.]

‡ Since reported
in 1 *Johns. Cas.*
120.

LIVINGSTON, J., delivered the opinion of the court. It is said, here was no abandonment, or that the reason assigned for it was not sufficient, and that, therefore, the abandonment made was a nullity. A denial of entry at the port of destination, without any seizure or arrest by government, appears to me, after considerable reflection, and many doubts, not a loss within this policy, which contains an express agreement, "that for a seizure or detention on account of *prohibited trade*, there shall be no remedy." How then can underwriters, who do not assume the greater risk of seizure, which, in common cases, constitutes a technical total loss, be answerable for a smaller one, proceeding, too, from the same cause, that is, an *illicit trade*? But as the *Mason's Daughter* had a right to go to another port, and was driven into *Port Republican* on her way thither, it is supposed that the abandonment must be considered as founded on the latter accident, especially, as it was not made until after her arrival there, and intelligence of it received here. But if this were really the cause of abandoning, it is

not the one assigned by the assured. On the contrary, it is placed entirely *on the refusal to permit an entry at the first port. It will hardly be said, that to constitute a valid abandonment, it is not necessary to state the true cause. Though no form be prescribed for this act, yet care should be taken, that it be unconditional, explicit, and on sufficient ground; and, particularly, that the accident occasioning it be described with certainty, so as to enable an underwriter to determine whether he is bound to accept. If he be not, he will, of course, refuse, and neglect to take measures for the preservation of the property, which is one object of making an abandonment. The assured here, having relied on matter which was not a justifiable cause, must be bound by it, and shall not be permitted to avail themselves of a subsequent accident, without making a new abandonment. *Emerigon*† appears to be of this opinion; he considers an abandonment absolutely null, if, at the time, there was neither "a capture, nor shipwreck, nor stranding, nor arrest of princes, nor innavigability, nor a total loss;" and adds, that "an abandonment founded in error *produces no effect*." Our opinion, then, is, that here was no valid abandonment, and though it be settled with us, that such an act is never too late, while the loss continues total, yet we have not said that a suit can be maintained without any abandonment at all, or on one assigning a reason which justified a refusal to accept.

Another objection to a recovery, which applies as well to a partial, as a total loss, is, that the long stay at *St. Jago de Cuba*, or at the mouth of the river, amounted to a deviation; but the jury having determined otherwise, we are satisfied to consider this question at rest. I will only add, that the agreement of counsel to adjust the accounts, must have referred only to the case of the defendants' being liable for a total loss, and that, therefore, the plaintiffs have no right, under that agreement, so to model the verdict as to give them what would be a compensation for a partial loss, admitting a right to that extent to exist. To ascertain this point, and what, in such case, will be a proper rule of damage, there must be a new trial, with costs to abide the event of the suit.

I observe, further, that it is not intended to say, what would *be the effect of a denial to trade, if the voyage insured had ended at *St. Jago de Cuba*, that is, whether the risk would have ended there, or have continued to another port. The assured having a right in this case to go elsewhere, that question is not before us.

New trial granted.(a)

(a) See *Dederer v. Delaware Insurance Company*, *King v. Delaware Insurance Company*, *Hurtin v. Phoenix Insurance Company*, decided in the Circuit Court of the U. S. for Pennsylvania district. *Condy's* edition of *Marshall on Insurance*, vol. 2. p. 601. *as in note.* *Speyer v. New-York Insurance Company*, 3 Johns. Rep. 83.

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† Vol. 2. p. 19*

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A policy of insurance contained the following memorandum: "The vessel sails under a sea-letter without a register; property warranted American;" it was held, that parol evidence could not be admitted to explain what was meant by a sea-letter, as the nature of the document was settled by public treaties and acts of Congress. A sea-letter and a certificate of property, are distinct documents; and sail-
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ing with a certificate of ownership is not a compliance with the warranty.

Where money is paid into court under a rule on a policy of insurance, the plaintiff, by taking it out, will not be precluded from proceeding for a total loss, when he informs the defendant's attorney, at the time, of his intention to go for a total loss.

Where a bill of exceptions or a special verdict is taken, and a case is also made, the party must make his election to proceed on one or the other, and will not be allowed to argue both.

† 27th Article.
25th Article.
27th Article.

THIS was an action on an open policy of insurance, on the cargo of the brig *Three Friends*, on a voyage from *New-York* to *New-Orleans*. The policy was underwritten by the defendants, *October*, 1798, at a premium of 15 per cent. At the foot of the policy was the following written memorandum: "N. B. The vessel sails under a sea-letter, without a register; property warranted *American*; proof to be made here only."

The *Three Friends* sailed on the voyage insured, but sunk suddenly at sea, about 50 miles from *Sandy Hook*.

The cause was tried at the *New-York* *Sittings*, on the 24th *December*, 1804, before Mr. Justice *Tompkins*.

On the trial, the plaintiffs, to prove their compliance with the warranty contained in the policy, exhibited a paper called a *certificate of ownership*, and offered witnesses to prove, that according to the usual understanding and acceptance among merchants, at the time when the policy was underwritten, this certificate was a *sea-letter*, within the true intent and meaning of the policy. The defendants' counsel objected to this evidence as incompetent, and contended that a sea-letter was a paper under the seal of the *United States*, subscribed by the president of the *United States*, and prescribed by the treaty between the *United States* and *France*, the 6th of *February*, 1788,† the treaty between the *United States* and the *United Netherlands*, the 8th *October*, 1782,‡ and between *Spain* and the *United States*, the 20th *October*, 1795,§ the forms of which are annexed to those treaties respectively. These *sea-letters* proper, as they are called, are in four different languages, *English*, *French*, *Spanish* and *Dutch*; some of them were sent by the secretary of the treasury of the *United States*, in *May*, 1793, to the collector of the port of *New-York*.

Sea-letters of this form were granted by Congress, in 1784, and it appeared that a similar one had been given to a vessel at *Philadelphia*, which sailed from that port on a voyage to *Curaçoa*, in 1797, and another to a vessel which sailed to *New Providence*, in 1784. That this document being known and established by law as a sea-letter, no parol evidence could be admitted to show any understanding among merchants to the contrary. The judge, however, admitted the evidence. Several witnesses deposed that the meaning of the words "not having a register, and sailing with a sea-letter," was understood, among merchants, to be, where a vessel was without a register, or not entitled to a register, but had a *certificate of ownership*. Other witnesses considered the *sea-letter proper* as necessary only in foreign voyages; that sometimes both documents were taken. That the sea-letter was not an essential.

but an accumulative document. The certificate of ownership was given by the officers of the customs, under a general power they have to certify any fact which is made to appear to them, in relation to ships and merchandise. The sea-letter was supposed to protect the vessel and cargo, while the certificate related only to the cargo. The form of the certificate has sometimes varied, but not the substance, and it is granted on the oath of the master. Many vessels sailed with *sea-letters*, and with certificates only, the latter being considered sufficient.

The defendants' counsel objected to any evidence of loss on the part of the plaintiffs, or any other evidence, but that might entitle them to a return of premium.

*It appeared, that a case having been made in this cause, after the former trial, the plaintiffs' counsel declined to argue the motion for a new trial, insisting, however, that they were entitled to a return of premium with interest, and that a new trial ought to be awarded for that purpose. A rule was entered to that effect, that if the defendants should pay into court the amount of the premium, they might proceed to trial, and if they recovered no more than the sum paid in, they were to pay costs. Pursuant to this rule, the defendants had paid the money into court. The money had been taken out by the plaintiffs' attorney, and evidence was offered to show that this had been done by consent of the defendants' attorney, and without prejudice to the plaintiffs. It was objected that no agreements were admissible, unless in writing; but the judge allowed the attorney of the plaintiffs to be examined, who deposed that he understood it to be by consent, and without prejudice to the plaintiffs' right. The judge thereupon ruled that the plaintiffs were not precluded, by taking the money under this agreement, from proceeding for a total loss.

During the trial, the plaintiffs' attorney returned the money into court. The defendants' counsel, on the evidence produced, moved for a nonsuit, but the judge permitted the cause to go to the jury, who found a *special verdict*. A bill of exceptions was also taken.

On opening the argument, *Hoffman*, for the plaintiffs, observed, that it ought to be confined to the special verdict. That where a bill of exceptions, or a special verdict is taken, no case ought to be made. The party has his election to tender a bill of exceptions or make a case, but he cannot do both. Having done the former, he ought not to be allowed to argue on the case. Cases came into practice with motions for new trials. If the case be argued, and the court order a new trial, and the evidence be there overruled, the plaintiffs will be then compelled to file their bill of exceptions, and carry the cause to the Court of Errors, who may award a *venire de novo*, and the whole ground must be again travelled over, at great expense, and with long delay to the parties.

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**Harison*, contra. If the cause rested solely on the bill of exceptions, it might be carried to the Court of Errors, as an appeal from the opinion of the judge at *nisi prius*, without waiting for the decision of this court.

The court said, as this was a new and unsettled point of practice, the counsel might argue this cause both on the case and special verdict, or on either, as they thought best. But they *ordered* that, in future, the party should make his election either to proceed on the special verdict, or on the case made

Riggs, for the defendant. (*Pendleton* on the same side.) Three points arise in this cause: 1. That the judge admitted improper evidence; 2. That he mistook the law, as arising on that evidence, if it were proper; 3. Admitting the evidence to be proper, the verdict was against the evidence.

11 Term Rep.
164. *Cox v.*
Parry.

1. By paying money into court, the contract is affirmed, and it admits that the plaintiffs are entitled to the sum paid, leaving only the question to be determined whether they be entitled to more.† The premium having been paid into court, the right of the insured to a return of premium was admitted, and that the defendants were not liable on the policy. When the plaintiffs took the money out of court, they affirmed the act of the defendants, for it was under a rule to pay the *premium*, and not to pay money generally. Taking the money out of court was conclusive against the plaintiffs, and its having been returned again during the trial did not restore them to their rights, but was rather an acknowledgment that they considered the first act as conclusive. Though the payment of money into court in a case of unliquidated damages, be irregular, yet if the party take the money out, it is a waiver of that irregularity: and if done by his attorney or agent, without his knowledge, it is as binding on him as if done by himself.‡

† 1 Term Rep.
710. *Griffiths v.*
Williams.

2. Where the terms of a written contract are clear and explicit, the general rule is well settled, that no *parol* evidence is to be admitted to explain it; but it must be expounded by the court. The exceptions to this rule have been admitted with extreme caution. In regard to a warranty in a policy *of insurance, this caution is the more necessary, as it is a fixed principle that warranties are to be strictly and literally complied with. Matters of usage may be proved by witnesses: but their opinion of the meaning of any clause in a policy can never be received in evidence.§ The meaning of a written instrument is a question of law, which courts alone are competent to decide. Opinions of men are never evidence. The testimony in this case was improper to prove the commercial import of the words contained in the policy.

¶ *Marshall*, 609.
Douglas, 511.
Noble v Ken-
noway.

|| *Blagge v. N.*
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Co. 1 *Caines*,
564.

A general warranty of *American* property implies, that it shall be documented according to the laws of this country.||
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If goods be warranted neutral, they must be on board of a neutral vessel, which must sail with all those documents, that, according to existing treaties and the law of nations, will entitle her to the privileges of neutrality.†

By the treaties made between the *United States*, and *France*,‡ *Spain*,§ and *Holland*,|| sea-letters or passports are required, without which an *American* vessel cannot claim the privileges of an *American*, but is liable to seizure and confiscation.

All the witnesses say, that they understood very well the difference between a certificate of ownership, and a sea-letter or passport, and that a sea-letter was as essential to an unregistered vessel, as to one that was registered. The former is mentioned, as being, in *common parlance*, a sea-letter; but the jury expressly find that it was such in the understanding of these parties.

Radcliff and *Hoffman*, for the plaintiffs. What is stated in the special verdict is matter of law, and is, therefore, ground for error. What is contained in the case furnishes the basis of a motion for a new trial. The first two points arise out of the special verdict: the third point is that on which the motion for a new trial is to be made.

1. The taking the money out of court did not preclude the plaintiffs from proceeding for a larger sum. If the party pays money into court, under a rule for that purpose, he cannot take it back, even though it be paid under a mistake.¶ There is no reason, then, why it should remain *in court; nor can the plaintiffs be prejudiced by taking it out.†† Even if the rule were otherwise, it ought not, in the present case, to be applied to the injury of the plaintiffs, as there was an evident understanding on the part of their attorney, that the defendants' attorney consented to its being done, without prejudice to the rights of the plaintiffs. If there has been a mistake, the plaintiffs ought not to be concluded by the act of their attorney. The plaintiffs may take out the money paid into court, any time before verdict; after a verdict for the defendants, it would, perhaps, be retained as security for the defendants' costs.‡‡ Money may be paid into court on a particular count; and, in this case, the premium must be considered as paid on the count for money had and received to the use of the plaintiffs, and does not preclude them from proceeding, as for a total loss, on the other count on the policy. §§

2. The object of all evidence, in relation to contracts, is to discover the intention of the parties. The general rule, as to the admission of *parol* evidence in regard to written instruments, is not to be questioned. But there are many exceptions to this rule; and, in all commercial contracts, a more liberal construction has prevailed, conformable to the usage of trade and the real intention of the parties. ||| In the case of

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† 3 Bos. & Pull.
201. *Baring v. Claggett*.

‡ 8th Feb. 1778.

§ 20th Oct.
1795.

|| 8th Oct. 1782.

¶ *Malcolm v. Fullarton*, 2
Term Rep. 645.
Barnes, 281.

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† *Sellon's Practice*, vol. 1
p. 307. *Sayer*
316.

‡‡ 1 Bos. & Pull
332. *Le Greu v. Cooke*.

§§ 3 Bos. & Pull
366. *Muller v. Hartshorne*.

||| *Abbott*, 16.
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† Abbott, 206.
Pickering v.
Barclay, 2 Roll.
Abr. 248. Style,
132. See also 3
Esp. Cas. 67.

† Marshall,
249. See also
Marshall, 143.
Park, 116.

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a charter-party, as far back as the reign of *Charles I.* the court admitted the evidence of merchants, as to the meaning of the words *perils of the sea*, excepted in that instrument.† Though in this case the insurance was on the cargo, the warranty emphatically relates to the vessel. Now, if a *sea-letter*, according to the commercial sense of that document among merchants, be in fact on board, the court will intend, that there has been a compliance with the warranty. The clause of warranty, like every other part of the contract, is to be construed according to the understanding of merchants, and the commercial import of the words.‡ If terms have acquired an appropriate meaning among merchants, *parol* evidence is admitted to show the mercantile sense, in contradistinction *to the strict grammatical, or technical sense. The warranty of *American* property does not require the *sea-letter*. It has been decided in this court that the warranty is complied with, if the goods be proved to be *American*, though not laden on board of an *American* vessel.

But in relation to the vessel, the certificate of ownership is substantially the same as a *sea-letter*; all that belligerents can require, is satisfactory proof of its being neutral property. A *passport* and *sea-letter* are different documents.§ The former is the most essential. It is not necessary to have all the different documents usually enumerated.|| It is enough if the usual and customary documents are found on board. It is the usage for *American* vessels to take *sea-letters*, in voyages to *Europe*; but to the *West Indies*, and coastwise, they most generally sail with a *certificate* only.

3. The material points in this cause arise out of the special verdict; and the only question, as to the motion for a new trial, is, whether this be a verdict against evidence. The fact of the loss was not disputed by the defendants. *Ferrers*, their agent, to whom they referred the papers, computed it at 98 per cent. His authority to make the adjustment is undisputed, and it ought to be *prima facie* evidence, at least, against the defendants. If a vessel be seaworthy, at the time of her sailing, and, afterwards, sinks at sea, if the particular cause be unknown, the legal presumption is, that she was lost by the perils of the sea.¶ The defendants in this case, have offered no evidence to rebut this presumption. All the witnesses agree in saying, that the paper on board was, in the general and commercial understanding of the word, a *sea-letter*. If the document was, in *common parlance*, a *sea-letter*, it was a compliance with the warranty. The jury were warranted in their conclusion, that such a paper was on board, according to the agreement of the parties. By the act of Congress,†† a certificate is given to unregistered vessels, which entitles them to the same privileges as vessels carrying a *sea-letter*; and by a supplementary act,‡‡ *passports* are directed to be given to vessels sailing with a *sea-letter* to foreign countries, which plainly

§ Marshall,
317.

|| See Hubner,
de la saisie des
batimens neu-
tres, tom 1. part
2. c. 2. § 10.
Valin des Pri-
ses, c. 5. s. 3. p.
2. Azuni, Droit
Maritime de
l'Europe, part
2. c. 3. art 4.
§ 11.

¶ See the case of
Patrick v. Hal-
lett and Bowne,
post, 241.

†† Laws U. S.
A. v. 6. p. 72.

‡‡ Laws U. S.
A. v. 6. p. 219.

*distinguishes those two documents. Again, a ship sailing with a *sea-letter*, was entitled to a *Mediterranean* pass; and it was understood at the custom-house, that a vessel having a *certificate* of ownership, might receive such pass. Thus it appears from the acts of Congress, and the officers of the revenue, that such a paper is the same as a *sea-letter*. The verdict of the jury is, in every part, supported by the evidence.

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Harison, in reply. 1. There was a special rule in this cause, allowing the defendants to pay the money into court. The payment of the *premium* into court, and the taking it out, is a tacit admission, that there was no contract on the policy, and that the plaintiffs had no right to go for a total loss. They bring their action either for a total loss, or to recover back the *premium* that has been paid. Having made their election, and received the premium, they must abide by it. They cannot blow hot and cold; at one time affirm, and at another, disaffirm, the contract. The mere belief of the plaintiffs' attorney as to the consent of the defendants' attorney, to the taking the money out of court, is entitled to no weight. The rule of this court, requiring all agreements to be written, is a wise and salutary rule, and ought to be enforced.

2. The warranty in the policy is not to be confined to the cargo. It may, perhaps, be a question whether a warranty of *American property* does not imply that the vessel is *American*. If so, it must be a vessel properly documented, or in other words, an *American* vessel. The true meaning of the clause in the policy is, that the vessel, as well as cargo, shall be *American*; else, why require a document which belongs only to vessels of the *United States*? It is evident that the parties understood the vessel to be *American*; and she ought, therefore, to have had the necessary documents of such a vessel for the voyage. It is true, that in a policy on goods, where nothing is said about the national character of the vessel, it has been decided, that they may be laden on board a foreign vessel. This contract was made, *flagrante bello*, and the parties must have had in view a *neutral* vessel, sailing with all the requisite proofs of her neutrality. Though *the not having this document on board would not authorize a belligerent to seize and confiscate; yet, by certain treaties between the *United States* and other powers, a passport or *sea-letter* proper, in contradistinction to a certificate of ownership, is rendered necessary to prevent their being taken and carried in for examination. It is a provision for the benefit of *American* commerce; and for that reason the insurers might well stipulate that this paper should be on board. It was prudent in them to require that the vessel should be provided with all the documents necessary to protect the property. The passport or *sea-letter* proper, as it is called, was framed by the government of the *United States*, to be used by all *American* vessels in time of

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war. In 1793, the secretary of the treasury sent these sea-letters to all the custom-house officers, to be delivered to all American vessels, as it was a paper which foreign powers were bound to respect. The case of *Baring v. Claggett* (3 Bos. & Pull. 201.) shows the necessity of a passport, in the exact form prescribed by the treaty between the United States and France. In fact, both papers were requisite. The certificate of ownership to prove the property, in regard to the custom-house; and the sea-letter, to evince the nationality of the vessel, and to protect the cargo from being detained by a belligerent. It is important, in this view, as to the extent of the warranty, to know what is meant by a sea-letter. Parol evidence will never be admitted to explain the terms of a written agreement, unless there be some latent ambiguity. Where words are susceptible of a double construction, witnesses may be called to explain them.† Mere opinion can never be received.‡ Nor where words have a fixed and precise meaning, will resort be had to merchants for the explanation of the terms. Where words have a legal and appropriate sense, it would have a most dangerous tendency to allow parol evidence to give them a different meaning. Though parol evidence is sometimes admitted to explain a particular usage of trade, yet even in such cases, it will not be received to qualify or control the clear and unequivocal language of a written instrument.§ *Here the meaning of the words has been settled by the highest legal authority; by solemn treaties, which are paramount to all legislative acts: and this authority must govern, notwithstanding any prevalent mistaken use of the words among merchants. The letter of the secretary of the treasury directs, that sea-letters be delivered to vessels, actually and bona fide, the property of American citizens; and it is regarded as a document of great importance to the commerce of this country. The act of Congress,|| amending the act relative to drawbacks, declares that the provisions of the former act shall not apply to unregistered vessels, where they possessed at the time a sea-letter, or other regular document issued from a custom-house, proving her to be American property. Now a vessel could not have a sea-letter unless, bona fide, American property, and possessing that document, there could be no need of another to prove the property. Sea-letters were issued at the custom-house, and no where else. To be entitled to receive it, the vessel must be either registered, or have a certificate of ownership. By the act of Congress, also, Mediterranean passes could not be delivered to a vessel unless she had a sea-letter, a document of essential importance to identify the national character. From an examination of all the acts, as well as the treaties, it will be evident, that a precise legal meaning is given to the term sea-letter, and that it is understood by them to be different from a certificate of property.

† *Coker v. Grey*,
2 Bos. & Pull.
569.

‡ *Carter v. Boehm*,
3 Burr.
1918.

§ *Marshall*, 170.
[* 201]

|| *Laws U. S.*
A v. 6. p. 72.

3. There is no evidence of a loss in this case *Ferrers* is a

an agent to state cases, and compute the amount of losses, but is not authorized to bind the insurers. Their silence cannot be interpreted into an admission of the fact. The vessel has never been heard of, and the action is brought before the time of legal presumption has expired.

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When juries undertake to give special verdicts, they ought to find all the facts necessary to enable the court to decide on its true merits. Juries should be held to a strict performance of this duty; and where the facts are imperfectly stated, the court will not be more unwilling to set aside a special verdict, than where the cause comes before them in the shape of a case made after a general verdict.

*SPENCER, J., delivered the opinion of the court. This cause has been argued, on the special verdict, and for a new trial, on the ground that the verdict is not warranted by the facts proved.

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Several points have been made, which I shall examine in the order they were raised.

The effect of taking the money out of court by the plaintiffs' attorney, and his explanation of the circumstances under which it was taken out, are first to be considered: and this involves the import and meaning of the rule of this court under which the money was paid in.

When the rule was made, no doubt it was the impression of the court, as well as of the plaintiffs' attorney, that nothing was in controversy between the parties but the premium; and on that, the court were of opinion, interest ought not to have been demanded. The rule, however, is in the common form; and had not the plaintiffs recovered for a loss, they would have been obliged to pay their own costs, and the costs of the defendants posterior to the entry of the rule; but the court did not intend to deprive the plaintiffs of a right to go for a total loss, if they thought proper: they went on, at their peril, as to the costs. Had the premium been the only question, and the attorney had taken out the amount paid into court, it would have been the act of the party, and would have concluded him. The language of the rule ought not to operate against the rights of the adverse party; it is, substantially, a rule for the payment of a specific sum, and a decision that, for the premium, interest should be allowed. When, therefore, the attorney of the plaintiffs took out the money, having previously informed the defendants' attorney that the plaintiffs meant to go for a total loss, to construe the act of receiving the money, as an affirmation of the plaintiffs' right to the premium only, would appear to me to be unreasonable and unjust. I am of opinion, therefore, that the taking out the money did not prejudice the plaintiffs' right to proceed for a total loss.

*The next objection to the verdict is, that *parol* proof was inadmissible to explain the commercial import of the *nota bene*, "The vessel sails under a sea-letter, without a register."

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It appears to be well ascertained, that a *sea-letter* is, in truth, a document furnished by the custom-house, under the signature of the president of the *United States*, and the secretary of state; and that the paper which the plaintiffs had on board when the vessel sailed, was a certificate of *American* ownership, under the signature of the collector of the customs. It is not denied that this *nota bene* was a warranty, and that if the vessel had not what in judgment of law, is a *sea-letter*, then the warranty being broken, the policy is rendered void.

The *parol* proof goes to show, that in the year 1798, in *common parlance*, the *certificate of ownership* was a *sea-letter*; but that the difference between them was understood by most merchants. To the effect of this proof the defendants object, because it is an attempt to explain away the meaning of words that have a precise and legal import.

The usage of trade is, certainly, very properly resorted to, in a variety of cases, in commercial questions; but in a case situated like the present, in my opinion, the *parol* proof offered, ought not to have been admitted, or, if admitted, the jury should have been charged not to regard it.

It is of the first importance, in all cases of contracts, to ascertain the sense and meaning of the parties to the contract. When they reduce their agreement to writing, they are bound by the legal import of the terms they employ to express their meaning; otherwise, one party might allege that he had one conception of the purport of the contract, and the other might insist on a different conception. When this contract was entered into, such papers were known, as a *sea-letter*, and a *certificate of ownership*; their difference was well understood by merchants, and it appears, that they generally considered a *certificate of ownership* not to be, properly speaking, a *sea-letter*. It *does not appear that the defendants had such a conception, or fell into the error of considering the one of these papers as the other. It would, in my apprehension, be a departure from all rules of law, to admit an understanding or error of this kind to prevail against the certain, the known and legal import of the words. Though in commercial questions, I would pay every attention to the usage of a particular trade, when necessary to give effect to the intention of parties, I never can consent to explain away the clear and unequivocal language of this warranty, not in the least ambiguous, because some merchants may have perverted the meaning of the term *sea-letter*, well known in our laws, and specially provided for in our treaties.

From the terms of the special verdict, it appears to me that there must be a new trial. It states that the vessel insured sailed under a *sea-letter*, according to the terms of the policy, and the true intent and meaning of the parties; and that the *sea-letter proper* was not intended by the policy or the parties, to be on board, and that the same was not required to be on

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board, according to the commercial import of the terms. These facts are founded on the *parol* proof I have taken notice of, and that proof by no means justifies the assertion in the verdict, that the vessel sailed under a *sea-letter*, according to the terms of the policy, and the true intent and meaning of the parties. On the ground, therefore, that *parol* proof was admitted to explain terms perfectly understood, and to give them a sense different from their legal import, a new trial must be granted, with costs to abide the event of the suit.

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New trial granted. (a)

(a) A new trial was had, and a bill of exceptions tendered to the judge, who ruled, according to the above decision, that *parol* evidence was inadmissible to explain the meaning of the term *sea-letter*. On this a writ of error was brought, and the decision of the court, on that point, was reversed. See vol. 2. p. 233.

*N. L. & G. GRISWOLD against THE NEW-YORK INSURANCE COMPANY.

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THIS was an action on a policy of insurance, dated the 27th of February, 1804, on the freight of the ship *Culloden*, valued at 3,200 dollars, on a voyage "at and from New-York to Barcelona, with liberty to touch at Gibraltar." The loss was stated in the declaration in the following manner; that the said ship, while endeavoring to sail out of the harbor of New-York, in the prosecution of her voyage, "was assailed by tempests, and by the mere violence of the winds, waves and current, was driven aground and stranded, on the beach or shore of Long Island, at or near Brooklyn, and was then and there forced, driven, and cast upon and against certain sands, sandbanks and rocks, and the said vessel thereby became and was stranded, bilged, broken, shipwrecked, and filled with water, and the goods and merchandise laden on board the same, became and were wet, spoiled and damaged, and were rendered wholly unfit to be transported to their intended destination, insomuch as to render it expedient and necessary forthwith to sell and dispose of the same at public auction, &c. By means whereof the said voyage was interrupted, broken up and lost, and the freight so expected to be earned by the said vessel and assured, became and was wholly lost to the owners thereof." The cargo consisted of flour and staves.

The vessel, in attempting to get out of the harbor, on Saturday, the 3d of March, 1804, about three o'clock in the afternoon, grounded at Brooklyn, on the shore opposite the city of New-York. Having twisted her sternposts, she became extremely leaky; she was got off and hauled to a wharf at Brooklyn, where it became necessary to take out the cargo to prevent her sinking. All the flour, except about 150 barrels, was

A vessel, in attempting to get out of the harbor, in order to proceed on her voyage, grounded, in consequence of which she became leaky; the cargo, consisting chiefly of flour, being damaged, was unladen. The ship was repaired in six days at an expense of 150 dollars. Information of the accident was given to the underwriters on the ship and freight, the day after it happened, and a formal abandonment made to them, two days thereafter. The owners of the cargo received it of the owners of the vessel, and sold it at auction, at a loss

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of about 27 per cent. It was held, that the insured had no right to aban

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Jon; but ought to have insisted on carrying the cargo to the place of its destination, so as to entitle them to their full freight. The assistance given by the insurers, in saving the property, on being informed of the accident, did not amount to an acceptance of the abandonment.

The law for the inspection of flour intended for exportation, does not require that flour, once inspected and shipped, and afterwards damaged by seawater, should be again inspected, before it is exported. See S. C. vol. 3. p. 321.

damaged. The ship, on the 5th of *March*, was got over to *New-York*, and repaired in six days, at an expense of about 150 dollars, and was in possession of the assured ready for sea. The flour was sold for about half its cost, and for more than double the amount of freight. The plaintiffs, on the 4th of *March*, informed the defendants of the accident which had happened, requesting them to take such measures, for the preservation of the vessel and freight, as they might think proper. On the 5th, they made an abandonment of the freight to the defendants, on the ground that the voyage was broken up; and again, on the 7th, they made a formal abandonment of their interest in the ship and freight to the defendants, and offered them all the documents and information in their power. No answers were returned by the defendants to these communications. The defendants were also insurers on the ship. The cargo, which was insured by the *Commercial Insurance Company*, belonged to persons to whom the plaintiffs had chartered the ship for the voyage: the owners, on hearing of the accident, abandoned the cargo to the insurers, who accepted the abandonment.

One of the directors of the *New-York Insurance Company*, and their agent on such occasions, and another person, an agent of the *Commercial Insurance Company*, assisted and gave directions, in saving the cargo. The plaintiffs also assisted in the preservation of the vessel and cargo.

The cargo was taken away and sold by the *Commercial Insurance Company*, and, as it appeared, with the assent of the plaintiffs. The loss on the net sales of the cargo was about 27 per cent.

The charter-party between the plaintiffs and the owners of the cargo, contained the usual covenants, and that the same should be delivered, &c., "the acts of God, fire, and *all and every the dangers and accidents of the seas, and of navigation of whatever nature and kind soever, restraints of foreign powers, and all other casualties during the voyage, always excepted."

The cause was tried at the *New-York Sittings*, on the 16th day of *January*, 1805, before Mr. Justice *Livingston*, when the jury found a verdict for the plaintiffs, for a total loss.

The grounds on which the defendants now moved to set aside the verdict were, 1. That the declaration did not contain a sufficient averment of the loss; 2. That the plaintiffs had no right to abandon the ship or freight; 3. That the abandonment was not accepted; 4. That the verdict was against law and evidence.

Hoffman, for the defendants. The averment of a total loss of freight, contained in the declaration, is insufficient. Because the cargo was damaged, it did not follow that the plaintiffs would not be entitled to freight. The damage to the ship was

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very slight; she was repaired in a few days, at a small expense, and was in a situation to prosecute her voyage, and earn freight. It was in the power of the plaintiffs, as owners of the vessel, to have retained the cargo, as security for the freight, if the owners of the flour did not choose to send it forward to its place of destination, in its damaged state. The flour having been once regularly inspected and shipped, and the voyage commenced, there was no necessity for its being reinspected for exportation, since it must be considered as already exported. The continuation of the voyage would have been no infraction of the law for the inspection of flour and meal.† It would be very hard, therefore, to make the defendants answerable for a total loss; especially, as without an abandonment of the ship to them, they could have no right to the *lien* on the cargo for the freight. There is no pretence that any abandonment of the ship was made before the 7th of *March*, or that it was accepted. Prior to that time, the owners of the vessel had delivered the greater part of the cargo. Admitting that *enough remained to pay the freight, yet the defendants, by virtue of an abandonment, would be entitled to a *lien* on the whole cargo, which has thus been impaired by the act of the plaintiffs.

Nothing can fairly be inferred against the defendants, from the conduct of the agent of the defendants, who is usually employed in cases of wreck or stranding. It was essential to the preservation of the ship, that the cargo should be landed. He assisted, as a matter of duty; and it does not appear that he gave any directions, as to the disposition of the cargo. His acts, therefore, cannot be construed into a consent, on the part of the defendants, that the voyage should be broken up. The principal is not answerable for the acts of a special agent, further than while the latter acts within the scope of his authority.‡ Besides the cargo was unladen, and sent to auction, before the abandonment was, in fact, made.

The judge, at the trial, left it to the jury, whether the defendants had not accepted the abandonment, when there was no evidence whatever of that fact. The jury then must have found their verdict, without any evidence to support it.

T. L. Ogden and Riggs, for the plaintiffs. The declaration avers the breaking up of the voyage in consequence of the damage to the cargo, which is a total loss, from the interruption of the voyage. Freight is dependent on both vessel and cargo; and if the voyage be defeated by means of the cargo, it constitutes a total loss within the meaning of the policy. Though the flour was not, at first, so much damaged as to be totally lost, yet it was so far injured, that it must inevitably have spoiled before it reached its port of destination. It was the duty of the insured, and for the interest of all parties, that the voyage should be broken up, that as much as possible of

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† 1 *Rev. Laws*
of N. Y. 426.
sess. 24. c. 130.
s. 7. and 8

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‡ 1 *Esp. Rep*
at N. P. p. 111
East-India Co
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† Abbott, 343.

‡ 3 Bos. & Pull.
172. Patridge
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¶ 2 Burr, 386.

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the cargo should be saved. The ship-owners undertook to deliver the cargo, saving the perils of the sea. The perils of the sea have, in this case, prevented the delivery.

It is a just and sound principle of the *French* law, though it does not appear to *have been adopted by any *English* decision, that the charter-party is dissolved by shipwreck. So, in cases of embargo, where the goods are of a perishable nature, the contract is considered as at an end.† It would be a very rigid rule to compel the party to carry the goods to their place of destination, when it is certain that they must perish and be wholly lost, by the way. Every party is bound to a beneficial performance of his contract; but if an event intervenes which prevents the performance, or renders it injurious, he shall be excused. As in the case where A. underlet a house, with the furniture, to B., the latter was excused from paying or performing his part of the contract, because the furniture was subject to arrears of rent.‡ In consequence of the damage to the cargo, the contract of charter-party could not have been performed without injury to the plaintiffs; for if they had carried it in its perishable state, to the place of destination, they would have had no security for the freight, if it be law, as Lord Mansfield observed in the case of *Luke v. Lyde*,§ that the owner of the goods may abandon them for the freight.

The acts of the agent of the defendants strongly evince that the abandonment was accepted; and though he made no express declaration that he was acting for the defendants, yet this is the fair and just inference from his conduct. The unlading the flour before the abandonment was made, was an act of necessity, to prevent the ship from sinking. The plaintiffs were not bound to remain idle spectators, and suffer the property to perish. By the abandonment, the insurers became the owners of the flour, and it was their duty to have it re-inspected, if necessary. The 6th section of the act authorizes the reinspection of flour before inspected. But the true construction of the act is, that it prohibits the sending of damaged flour out of the state. The policy of the law is to preserve the reputation of the state, as to this article, in a foreign market. It should, therefore, be good, at the moment preceding its exportation. The plaintiffs were thus excused for not sending it to its place of destination.

The objection that the *lien* of the owners of the vessel was impaired *by the landing and delivery of a part of the cargo, begs the question. The owners of the cargo were not bound to put it on board of the ship after she was repaired, in order that she might earn freight. If so, the ship-owners were entitled to *pro rata* freight only. The notice given, on the 4th of *March*, to the insurers, to take care of their interests, enabled them to secure an indemnity for the freight, as effectually as if the ship had been transferred. If there was property on board sufficient to answer all demands, it was enough. To

entitle the defendants to receive the freight, it was not necessary to abandon the ship. As long as the law allows the ship and freight to be insured separately, the right to abandon the freight, whenever the voyage is broken up and defeated, must exist, and be supported throughout, distinct from, and independent of, the ship.

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Harrison, in reply. In six days after the accident, the ship was completely repaired, at a trifling expense, and capable of proceeding on her voyage. Can it be said that the assured had a right to abandon in such a case? If the right existed, it did not arise from the condition of the vessel; but from that of the cargo. But the state of the cargo will never authorize an abandonment of *freight*, while there are goods enough remaining to pay the freight. If the owner of the vessel has thought proper to give up the cargo, when he might have prosecuted the voyage and been entitled to full freight, it is his own act, for the consequence of which the defendants ought not to be made liable. The language of the contract is, if the freight be lost by the perils of the sea, the insurers will pay the amount, otherwise not. If the assured has delivered the cargo without receiving the freight, it is his own folly. The notice of the accident, said to be first given, though not stated in the case, may be considered as a very proper act, even though the plaintiffs had not any intention to abandon. The language and conduct of the agent of the defendants showed merely his coöperation with the plaintiffs, in saving the cargo, that it might be carried to its place of destination; what he did on the occasion was proper, *with a view to the probable average loss that might arise. His conduct, as to the unlading and saving the cargo, does not imply that he acted for the insurers, as owners; it was merely to diminish the loss that might arise from the accident. The abandonment was made on the 7th, when a part only of the cargo remained for them to take possession of, in order to secure the freight. If the plaintiffs before acted as the agents of the defendants, they violated their duty in disposing of the cargo. By delivering the best part of the flour and leaving only what was damaged, they impaired the security of the insurers for the freight. In the state in which the cargo was at the time, it could not be abandoned, for it was not deteriorated to half its value; and its future or possible state is not to be anticipated, as the ground of an abandonment. It is impossible to decide whether the sending of the goods forward in such a case, may not prove beneficial. If the vessel had been driven into an intermediate port, and the cargo thus slightly damaged, the assured would have been bound to have prosecuted the voyage. It is probable, that the cargo, when carried to its destined port, would have paid the freight, or at least a portion of it. The assured ought not to be allowed to decline taking this chance,

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and to break up the voyage, on mere conjectures as to the probable result. That the performance of the contract would not have been beneficial, is not a legitimate excuse. There are many contracts which the party is bound strictly to perform, though it may be to his own prejudice; as in the case of a common carrier, or a covenant to pay rent, which must be executed, though the premises are destroyed by fire.

The act relative to the inspection of flour furnishes no excuse. The flour, in this case, had been actually inspected according to law. If the vessel had been detained several weeks in port by contrary winds, would the inspectors have had a right to insist on reinspecting the flour, because, in the intermediate time, it may have received damage on board? It is enough, if the flour be inspected *at the time it is laden. As soon as the vessel is cleared out from the custom-house, the authority of the inspectors is at an end. The 9th section of the act applies merely to the inspection of the article, at the time of lading. The intent of the act is, no doubt, to maintain the credit of this staple. But its reputation cannot be affected by a deterioration arising from *sea-damage*, if not vitiated by any original or internal defect; for foreign nations will not impute the effects of sea-damage to any original bad quality in the flour.

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KENT, Ch. J. I am of opinion, that the plaintiffs might have carried on the flour without a reinspection, and if the owners had refused to permit them, they would have been liable for the full freight for the voyage. The inspection law does not apply to the case of flour duly inspected and shipped, and relanded after the commencement of the voyage, for a temporary purpose merely. It might have been otherwise, if the voyage in question had been given up, and the flour afterwards purchased for another and distinct voyage. But as long as the voyage continues, the first inspection will be sufficient.

The plaintiffs had also a right, on refitting their ship in due season, to insist on taking on the cargo, or to be paid their full freight. This rule received a clear and full recognition, in the case of *Lutwidge & How v. Gray*, determined in the House of Lords in 1733, (*Abbott*, 249.) and it was alluded to, as being a settled rule, by the Court of K. B., in the case of *Luke v. Lyde*. (2 *Burr*. 882.) But we have a nearer authority, in the case of *Herbert v. Hallett*, decided in this court in *April* term, 1802. It was an action on a policy on freight, on a voyage from *New-York* to the *Havanna*. The voyage commenced, and the brig was stranded at *Sandy Hook*. The cargo was unladen in an injured state, and brought back to *New-York*, and the vessel returned in three or four days, and in two or three weeks was completely repaired. The court held that the freight of the voyage was lost, by the negligence *or folly of the plaintiff, and not by the perils of the sea; for

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that he might have taken on the cargo, but having neglected to entitle himself to freight against the shipper, he ought not to recover it of the insurer.

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The only remaining inquiry in this case is, whether the defendants accepted, and thereby made valid, the abandonment of the freight. The abandonment of the ship was made to them on the 7th of *March*, when she was in safety. At that time, there was no color of right to abandon, nor was there any proof of an acceptance. The defendants did not, therefore, become owners of the ship, so as to have made it incumbent on *them*, to have offered to carry on the cargo. Nor is there any act of theirs, which looks towards an acquiescence in the abandonment of the freight. Their agent superintended the unloading of the ship, and that act was requisite for the repair of the ship; this superintendence was prudent and proper, as they were responsible for the damages and repairs; and it would be unreasonable to construe this act, which evidently had for its object only the repair of the ship, into an acceptance and ownership of the freight.

I suppose it unnecessary to examine the question, (a) whether the shipper would be liable for any freight, after having abandoned his cargo to the owner of the vessel, in consequence of its great deterioration, because, we have no reason to conclude from the case, that the flour would not have been of sufficient value, at the port of destination, to have paid the freight. The verdict before us is clearly against evidence and law, and ought to be set aside with costs to abide the event.

TOMPKINS, J., SPENCER, J., and THOMPSON, J., concurred.

LIVINGSTON, J. I concur in the opinion just delivered; but there is one point made in the cause that has not been noticed, and which it appears to me necessary to decide before the plaintiffs can have judgment.

*To make out a right to abandon, it was insisted that the injury which happened to the cargo, would have rendered it of little or no value before it reached its port of destination, and that, therefore, the plaintiffs would have earned nothing by carrying it on, as the shipper might, in such case, have avoided payment of freight altogether, by an abandonment of the property.

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That an owner of a vessel, after a literal performance of the terms of the charter-party, by carrying a cargo to its destined port, should be entitled to freight, whatever injury it may have sustained *in transitu*, so that it proceed from no fault on his part, appears a proposition so self-evident, that, perhaps, it never would have been questioned, but for what fell from Lord *Mansfield* in delivering judgment in the case of *Luke v. Lyde*.

(a) See *Abbott*, 3d ed. 282 to 292. The question appears not to have been decided in *England*. There is a dictum of Lord *Mansfield* in *Luke v. Lyde*, (2 Burr. 882.) that the goods might be abandoned for the freight; but see *Abbott*, 292. and 3 *Johns. Rep.* 300.

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"If the merchant," says his lordship, "abandons the whole cargo, he is excused freight, and he may abandon *all*, though they are not all lost." But, besides that a different point was then before the court, it is not certain, that Lord Mansfield intended to be understood, as speaking of an entire cargo actually transported to its place of delivery. If he did, I can only say, that the opinions of the most learned judges, on points not at the time in issue, though entitled to respect, have not the force of authority, on those who follow them. (a) This would be making the ship-owner an insurer of goods to the amount of his freight, and exposing him to an entire loss of the latter, without any fault on his part. Where is the evidence of his having assumed the risk? In the contract we look for it in vain; still less will the conclusion result from any fair course of argument. When a good vessel has been provided; when she has been well found; when she has performed the voyage, and is ready to deliver her cargo, there is nothing more which the merchant has required, as a condition precedent to the payment of freight. Upon what pretext, then, after having used the vessel agreeably to the contract, can he throw on the master's hands *a cargo which may not be worth a cent, instead of paying the sum agreed on for the carriage of his goods? What, in such case, is to become of the mariners? Are they, too, to lose the wages of their labor, which would be a natural, but unreasonable, consequence of such a doctrine; for, generally speaking, if freight be not earned, no wages are due; or are they also to come in for a dividend on a damaged and putrid cargo? Surely, they may say with the poet, *hæc in fœdera non venimus*. If the injury arise from the misconduct of the owner, master or mariners, or from unfitness or want of seaworthiness in the vessel, there is no hardship in depriving the owner of freight to the extent of the damage done, and rendering him liable for further compensation, if necessary to make the merchant whole, and also for the seamen's wages. Of the same opinion is Pothier,† in his *Treatise on Charter-Parties*.

New trial granted.(b)

(a) See *Robinson and another v. The Marine Insurance Company*, (2 Johns. Rep. 323.) *Scott v. Libby and others*, (2 Johns. Rep. 336.) 3 Johns. Rep. 321.

(b) See S. C. vol. 3. p. 321, and see the observation of Kent, Ch. J., p. 360

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In an action
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and false re-
turn, on mesne

THIS was an action on the case for an *escape*, and *false return*, on *mesne process*. The cause was tried at the *New-York Sessions*, the 17th April, 1805, before Mr. Justice Thompson

One *Briggs* was arrested by the defendant, who was sheriff of the city and county of *New-York*, on a *capias ad respondendum*, returnable in *July* term, 1798, at the suit of the present plaintiff, and, after being in custody in the gaol some weeks, he made his escape. The sheriff made a special return to the writ, of a *rescue*. In support of his claim to damages, the plaintiff proved, that *Briggs* was master of the schooner *Friendship*; and, on the 2d *December*, 1797, signed bills of lading for a quantity of goods shipped on board of the said schooner by the plaintiff, to be delivered to *R. & G. Kinkead*, at *Kingston*, in the island of *Jamaica*. *The invoice of the goods, amounting to 1,655*l.* 9*s.* 3*d.* *South-Carolina* currency, which was exhibited and proved, stated them to be shipped for the account and risk of Messrs. *R. & G. Kinkead*, of *Kingston*, they paying freight, &c. A balance of account of 129*l.* 11*s.* 3*d.* was also proved to be due from *Briggs* to the plaintiff. It further appeared in evidence, that *Briggs* ran away with the goods, and never delivered them to the consignees.

One *Hedden*, the gaoler, was called, on the part of the defendant, as a witness, to prove that the plaintiff's attorney, who is since dead, on being informed of the exertions used by the defendant and his deputies, to retake *Briggs*, replied, that it was no matter; that *Briggs* was not worth a cent, and that the defendant need not return the writ. This evidence, being objected to, was overruled by the judge.

It appeared from the testimony of several witnesses, that *Briggs*, while in prison, was very poor, and had no means of subsistence. He made his escape by the address and management of some persons who came to see him. The defendant made diligent pursuit after *Briggs*, and was at considerable expense in endeavoring to retake him, but without effect.

The judge informed the jury, that he thought that the facts did not justify the sheriff's return of a *rescue*; and that the plaintiff had established his right of action against *Briggs*, for the value of the goods specified in the bill of lading and invoice, as well as for the balance of account; but that the jury were to decide as to the amount of damages, under all the circumstances of the case; that the poverty of *Briggs* might be considered in mitigation of damages; and if the return of the sheriff was fraudulently made, it would be in aggravation of the damages which the plaintiff was entitled to recover. The jury found a verdict for the plaintiff for 3,000 dollars, damages; and on being asked by the plaintiff's counsel, they declared that they took into consideration both the amount of invoice and the balance of account.

**Hoffman*, for the defendant. The motion to set aside this verdict is made on two grounds; 1. The testimony of *Hedden* ought to have been admitted, to show the declarations of the plaintiff's attorney, in the original action, and to prove the in-

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process, against a sheriff, the plaintiff can recover no more than he might have done in the original action;

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nor ought he to recover more than he has actually lost in consequence of the escape.

If goods be shipped for the account and risk of the consignee, he paying the freight, and it is so expressed in the invoice and bill of lading, the delivery to the carrier is considered as a delivery to the consignee, who alone can bring an action against the carrier, in case they are not delivered. The property, by the bill of lading, is vested in the consignee.

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solvency of the defendant in that cause, in mitigation of damages; 2. The plaintiff, at all events, was not entitled to recover more than the balance of the account, as the goods specified in the invoice were for the account and risk of the merchants in *Kingston*, who alone had a right of action against *Briggs*.

1. The attorney of the plaintiff had a right to withdraw the writ if he pleased, and to direct the time and manner of its return. His declarations, therefore, ought to have been received as evidence against the plaintiff. The present suit was commenced long after the escape; and it would be unfair, if the attorney were allowed to lull the sheriff into security by such declarations, to deter him from making pursuit, or endeavoring to retake the defendant, and afterwards compel him to return the writ, and to be answerable for the escape. If these declarations did not amount to a legitimate excuse to the sheriff, they ought, at least, to have been received in mitigation of damages.

2. The present plaintiff had no right of action for the goods, mentioned in the invoice and bill of lading, which were shipped for the account and risk of the consignees. By the delivery to *Briggs*, the carrier, the property was transferred to Messrs. *Kinthead*, who, it is fairly to be inferred from the evidence, had paid *Potter* for the goods. The witness did not say that the amount was due the plaintiff, but merely that the invoice and account were regular and correct. It is a settled principle of law, that where goods are consigned for the account and risk of the consignee, who is to pay the freight, the property is transferred by the bill of lading, subject only to the right of the consignee to stop *in transitu*. (1 *Atk.* 245. *Snee v. Prescott*. 1 *Ld. Raym.* 271. *Evans v. Martlett*. 6 *East*, 22. *Newson v. Thornton*. 4 *East*, 211. *Cox v. Harden*. 7 *Term Rep.* 440. *Hodgson v. Loy*. 8 *Term Rep.* 330. *Dawes v. Peck*. 3 *Bos. & Pull.* 582. *Dalton v. Solomonson*.) (a) All the cases are cited and well considered, by Mr. Justice *Buller*, in the case of *Lickbarrow v. Mason*, in his opinion delivered in the House of Lords.† The case of *Davis and Jordan v. James*,‡ and that of *Moore v. Wilson*,§ may be distinguished from the others, and were decided on the principle, that the consignor had agreed to pay the carrier for the carriage of the goods. He might, therefore, bring the action against the carrier, on the ground of the contract between them. The judge charged the jury that the plaintiff had a right to damages to the value of the goods shipped, and the jury, under his direction, found the whole amount. If the principle here contended for be correct, the jury were misdirected, and the verdict ought to be set aside.

Riggs and Radcliff, for the plaintiff. 1. The acts of an attorney, no doubt, bind his client; but the mere declarations, or assertions of an attorney can never conclude the principal

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† See note in 6 *East*, p. 21.

‡ 5 *Burr*, 2680.

§ 1 *Term Rep.* 59

(a) *Abbott on Ship.* (3d ed.) 351—381. part 3. c 9.

especially when the person, to whom the declarations were made, did not act in consequence of them. Nor ought they to have been received in mitigation of damages. There was no express direction to the sheriff; it was the mere opinion of the attorney, which does not appear to have influenced the conduct of the sheriff, or to have lulled him into security.

2. It is not denied, that when goods are ordered by a person, and are delivered to a carrier for the account and risk of the consignee, the property is transferred by the consignor. The rule applies as between the consignor and consignee, or third persons. Still a right of action remains in the consignor against his agent the carrier, arising out of the contract for the delivery of the goods to the consignee. Admitting that, from the face of this transaction, the goods were to become absolutely the property of the consignee, and that the delivery to *Briggs* is to be regarded as a delivery to the persons named in the bill of lading; still it does not follow, that the right of action is exclusively in the consignee. Two persons may have a right of action for the same thing. A bailee may bring his action to recover the possession of a chattel, and so may the owner. A right of action exists in the consignor, founded on the contract made with the carrier, and there is a right of action in the consignee founded on the right of property. Suppose the bill of lading had never come to the hands of the consignee, he would not have had any contract or document on which to support an action. The consignor has, therefore, a right of action from the contract for the carriage, until the consignee interposes his superior right of property. Whatever may be the rights of third persons, it does not lie in the mouth of the carrier to make the objection to the consignor's claim. He is estopped by the bill of lading. The action may be brought either in the name of the person to whom the promise is made, or in the name of the person for whose use it is intended. (*Dutton v. Poole*, *Sir T. Raymond*, 302. *Hornsey v. Dimoche*, *Vent.* 119. *Bell v. Champlain*, *Hardres*, 321. *No. 3. Stackley v. Mill*, *Sty.* 296.) The case of *Snee v. Prescott*† turned solely on the right of property, and does not apply. Besides, it has been decided in subsequent cases,‡ that the consignor may maintain an action against the carrier. The true distinction seems to be, that where the action is founded on the contract for the delivery, it may be in the name of the consignor; but where it is on a tort, for a violation of the right of property, it may be brought by the consignee. If the right of action, therefore, in the plaintiff, be well founded, the damages are not excessive. Even if they went beyond the measure of the contract, it must be remembered, that there was unequivocal evidence of a false return, which was a just reason for increasing the damages. The return was false both in law and fact. Where a person is arrested on *mesne process*, and is actually confined in prison, the sheriff can never return a rescue,

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† 1 Atk. 246.

‡ 5 Burr. 2680
Davis and Jordan v. James. 1
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† *Compton v. Ward*, 1 Str. 429.
May v. Proby, Cro. Jac. 419.

for he is bound to keep the prisoner at his peril.† And if rescued, even by an invincible force, it is no excuse.‡ There is not a shadow of evidence to prove the fact of rescue. The defendant's witnesses proved the contrary. The poverty of *Briggs* is, in law, no ground for a mitigation of damages. In *Powel v. Hord*§ it was decided, that the poverty *of the party who had escaped, was so far from being a cause for mitigation of damages, that it furnished an additional reason for the jury to find the full amount of the plaintiff's claim, as he had lost the possibility of recovering the debt of the original defendant.

‡ 5 Burr. 2312.
O'Neil v. Munson.

§ 1 Str. 650.

Harison, in reply. In this action the plaintiff has no right to receive more than he has lost by the escape. He is entitled to an indemnity only for the injury he has sustained. If the consignor has really lost nothing, and has not been injured by the non-delivery of the goods to the consignee, he is not entitled to recover damages of the defendant. *Briggs* does not appear as the master of the vessel, in the employ of *Potter*, but as owner; and the plaintiff appears as a commission merchant, purchasing and shipping goods for the account and risk of Messrs. *Kinkeads*. The goods being shipped for the account and risk of the consignee, who was to pay the freight, the property was transferred by the delivery of the bill of lading, subject merely to the consignor's right to stop them *in transitu*. The plaintiff does not pretend to have any right of that kind. How then is he injured? or how is his right, against the consignees, impaired by the conduct of *Briggs* since the goods were at the risk of Messrs. *Kinkeads*? There was a complete sale and delivery of the goods, as between vendor and vendee; and the latter alone has the right to bring an action against the carrier for a breach of his duty. The doctrine on this subject is founded in reason; and law and reason ought never to be at variance. If all the cases were examined, the law, as contended for on the part of the defendant, will be found well settled.|| It is about 50 years since the doctrine was laid down by Lord Ch. J. *Hardwicke*, in the case of *Snee v. Prescott*.¶ In that case, no distinction was made between an action arising on the contract between the carrier and consignor, and that founded J. on the right of property in the consignee. If any such distinction had existed in law, or in sound sense, it would not have escaped the discernment of that great and learned judge. In *Evans v. Martlett*,†† the principle is stated generally, that where goods are consigned by a bill of *lading to A., the consignee must bring the action against the master of the ship, if the goods be lost. The case of *Davis and Jordan v. James*,††† seems to have given rise to all the doubt on this subject. It appears to turn on the point of the price of carriage being paid by the consignor; but, from an attentive perusal, it will be evident that the property was considered as in the consignor. The case in 1 *Term Rep.* 659. §§ is the same. In

¶ 6 *Term Rep.* 21. in note, *Lickbarrow v. Mu-son*.

¶ 1 *Atk.* 245.

†† 1 *Ld. Raym.* 271. S. C. 12 *Mod.* 156.

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†† b *Burr.* 2680

§§ *Moore and Wilson.*

Dawes v. Peck,† which was an action on the case against a common carrier, *Ld. Kenyon*, at *N. P.* considered that the delivery to the carrier fixed the property in the consignee, and that he alone could bring the action. On a motion for a new trial,‡ the counsel relied upon the case cited from 5 *Burr. Rep.* 2680. and 1 *Term Rep.* 659. but the whole court agreed with *Ld. Kenyon*, that the right of action depended on the right of property; that those two cases were exceptions to the general rule, and were decided on a special agreement between the consignors and carriers. In the case of *Coxe v. Harden*,§ it was held that where goods were shipped for the account and risk of the consignee, the property vested in him; and having got possession, though under a bill of lading deliverable to order of the consignor, and unendorsed, his property was considered as absolute and indefeasible. After the plaintiff parted with the possession of these goods, and the evidences of property, he had no claim over them. Considered as an agent or trustee for the consignees, he cannot maintain an action in his own name. Two actions for the same cause cannot be supported; for then the carrier would be made liable to both parties. The criterion of the right of action is the right of property. The legal owner alone has the right to bring the action. Should the present plaintiff recover the amount of the invoice, *Briggs* would still remain liable to Messrs. *Kinkeads*.

Reason, as well as law and justice, is opposed to the doctrine contended for by the plaintiff.

The false return of the sheriff was no ground for increasing the damages. An action for an escape on *mesne* process, or for a false return, was the same thing. The false return did not injure the right of the plaintiff. If the sheriff had *returned an escape, the plaintiff might not have recovered a cent. The present plaintiff can never be entitled to recover more than he had a right to recover of the original defendant. The doctrine cited from 1 *Strange*, 650. that the poverty of the defendant enhanced the plaintiff's claim, does not apply to the present case. The conduct of the sheriff throughout the whole transaction was meritorious. There is no pretence of any collusion with the prisoner as to the escape; and every possible exertion was used to retake him.

TOMPKINS, J. The declarations of the plaintiff's attorney, offered as evidence on the trial, proved nothing more than his opinion, at that time, of the solvency of *Briggs*. This would not be legal and proper testimony of that fact; and had the attorney himself been alive, and produced as a witness, he would not have been permitted to give his own surmises, or belief upon the subject, but must have detailed facts, that the jury might draw their inferences from them. The proposed testimony to establish the insolvency of *Briggs* was properly overruled. But the escape was before the day on which the

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† 3 *Exp. Cas*
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‡ 8 *Term Rep*
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§ 4 *East*, 211.

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writ was returnable; and a recaption of *Briggs* by the sheriff before the return, might have been pleaded, and would have shielded him in an action for the escape. If, therefore, the conduct or declarations of Mr. *Remsen*, who was the attorney of *Potter*, and had the control of the suit, had a tendency to throw the sheriff off his guard, or to induce him to forbear to make exertions to apprehend *Briggs*, such conduct or declarations ought to have had an influence in the cause, and should not have been excluded. In granting new trials, however, upon the subsequent discovery of testimony or for the rejection of testimony offered, we ought to consider whether it would, or ought, to vary the issue of the cause; if it would not, the court will not send the cause again to a jury. In the case now under consideration, the declarations of *Remsen* were made after the sheriff had used the most active exertions, and had spent large sums of money to retake *Briggs*, and after his agents had returned from *Massachusetts*, and abandoned the idea of retaking him. *Though not expressly stated, yet it is to be inferred from the case, that before the declarations of *Potter's* attorney were made, the return day of the writ had passed. Under these circumstances, it is evident that the observations of the attorney could have had no tendency to prejudice the sheriff, or relax his exertions, and, therefore, if admitted, ought not to have varied the verdict of the jury.

It is impossible to determine whether the circumstance of the defendant having made a false return to the writ, operated on the minds of the jury to increase the damages. The judge was perfectly correct in stating to them that the return was legally false. But I do not think that, even if the sheriff knew it to be so, it ought to aggravate the damages. The true question is, What has the plaintiff lost in consequence of this escape? The alleged false return by the sheriff, neither adds to, nor diminishes, the loss, and, therefore, the solvency of *Briggs* or his capacity to pay, must determine the *quantum* of damages sustained. If the circumstance of a false return be a substantive ground of damages, it would follow, that where the person escaping was perfectly solvent, and the sheriff makes a false return, the creditor might recover in damages more than the full amount of his debt.

But the damages are excessive, for another and much more cogent reason. The jury founded their verdict upon *Potter's* right of action against *Briggs*, not only for the balance of the account current, but also for the goods specified in the bill of lading and invoice. It appears to be an invoice of goods shipped by *John Potter* for *Kingston in Jamaica, &c.*, on account and risk of Messrs. *Richard & George Kinkead* there, and cartage, wharfage, cooperage and commissions are charged by him to the Messrs. *Kinkeads*. By the bill of lading, the goods are to be delivered to the latter, or to their assigns, they paying freight. It is not denied, that the bill of lading and invoice may be liable to

explanation; but as the case is destitute of any proof, except the documents themselves, to show the relation between the consignor and the consignee, the plaintiff must be regarded as a mere agent purchasing on commissions; and any *property he might have had in the goods was divested by the delivery to the carrier, to be transported at the risk and expense of the consignees. If his property in the goods was divested by that delivery, no right of action for them could have remained.

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In the case of *Dawes v. Peck*, (8 Term Rep. 330.) it was held that the right of action was to be governed by the consideration in whom the legal right to the property was vested. This principle was also adopted in *Evans v. Martlett*, (1 Ld. Raym. 271.) and in *Snee v. Prescott*. (1 Atk. 248.) The authorities commented upon in 6 East, 23. are decisive to show, that consignors, in the situation of *Potter*, in this case, cannot bring the action against the carrier. *Potter* was not answerable for the act of the captain; nor was he liable to the latter for the price of transportation; neither could he receive any injury from the non-delivery of the goods, except so far as it might prejudice his right to stop *in transitu*. The consignees were liable to him for the price of the goods, whether they arrived or not, and for aught that appears by the case, he may already have received of Messrs. *Kinkeads*, the invoice amount. Nothing has been disclosed to show, that he has received any damage in consequence of being deprived of the power of stopping *in transitu*, or that any necessity existed for the exercise of that right. Even if his equitable *lien*, or right of stopping *in transitu*, were destroyed by the act of the master, yet I very much question whether the remedy therefor would be upon the contract; as I am inclined to think redress for that injury must be sought in a special action on the case, or in an action of trover. Inasmuch, then, as *Potter* could not have recovered the amount of the bill of lading and invoice, in the original action against *Briggs*, damages ought not to have been allowed him, in this action, on that account. I am of opinion, therefore, that a new trial must be awarded, with costs to abide the event of the suit.

THOMPSON, J. The principal question arising out of this case is, whether *Potter*, the plaintiff in this action, could have maintained an action against *Briggs*, on the bill of lading signed by the latter. To say that he could not, appears *to me so repugnant to the general rules of law relative to the rights of parties arising out of special contracts, that I should require the most unequivocal and binding authority to lead me to adopt such a conclusion. The *bill of lading* specified that the goods were shipped by *Potter*, and were to be delivered to Messrs. *Richard & George Kinkead*, at *Kingston, Jamaica*, or their assigns, they paying freight. It is true the *invoice* stated the shipment to be for account and risk of the

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Messrs. *Kinkeads*. But the master's contract, by his bill of lading, was made with *Potter*; and the stipulation on his part was to deliver the goods to the consignees, they paying freight; and it does not, I think, lie in his mouth to call in question the right of property, as between consignor and consignee. There appears some little confusion and contradiction, in the reported cases and decisions on this subject. In the case of *Evans v. Martlett*, (1 *Ld. Raym.* 271.) it appears to be laid down as a general rule, that if goods be consigned by bill of lading to A., he is the owner, and must bring the action against the master of the ship, if the goods be lost. The same rule appears to have been adopted in the case of *Daves v. Peck*, (8 *Term Rep.* 330.) and the court there seem to think the right of action vested in the party who was to pay the freight, whether it be consignor or consignee. Lord *Kenyon* says, the only case where the consignor can maintain the action, is where he is answerable for the price of the carriage. Yet in the case of *Moore and others v. Wilson*, (1 *Term Rep.* 759.) the payment of the price of carriage was not considered the criterion by which to determine the right of action. The action there was by the consignor against the carrier; and it was alleged in the declaration, that the plaintiffs were to pay for the carriage of the goods; but on the trial it appeared that the consignee was to pay. Mr. Justice *Buller* nonsuited the plaintiff, but the nonsuit was afterwards set aside, and *Buller* said he had been mistaken in point of law; for whatever might have been the contract between the vendor and vendee, the agreement for the carriage was between the carrier and the vendor. And in the case of *Davis & Jordan v. James*, (5 *Burr.* 2680.) the consignors *were permitted on the trial to maintain their action against the common carrier. The plaintiffs recovered, and on a motion for a new trial, it was urged that the consignee only could maintain the action; but Lord *Mansfield* said, there was neither law nor conscience in the objection. The vesting of the property may differ according to the circumstance of cases, but it does not enter into the present question. This is an action upon the agreement between the plaintiffs and the carrier. The plaintiff was to pay him: the action is properly brought by the person who agreed with, and was to pay him. If the payment of the freight be an immaterial circumstance, in determining the right of action upon the bill of lading, according to the decision in the case of *Moore and others v. Wilson*, before cited, then the case of *Davis & Jordan v. James* goes the full length of giving the consignor a right of action, founded on the agreement contained in the bill of lading. That the payment of freight cannot affect the rights of the consignor, appears to me manifest: that is a matter of arrangement between the consignor and consignee; and the reason why, by the bill of lading, according to the usual course of business, the consignee is to pay the freight, is be-

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ause none is due until the delivery of the goods. Upon the whole, considering the contradictions that appear in the books on this question, I think it more analogous to the general rules of law applicable to contracts, to adopt the decisions which give a right of action to the party with whom the contract was made; and must still retain the opinion, expressed by me upon the trial, that *Potter* had a good cause of action against *Briggs*, upon the bill of lading.

With respect to my having misdirected the jury, in telling them, that if the sheriff had been, in their opinion, guilty of fraud, in making the return he did on the writ, it was matter of aggravation, I have only to observe, that if the idea communicated to, and received by the jury, was, that they might give what is commonly called smart-money, beyond the actual damages of the plaintiff, it was undoubtedly incorrect. But I am satisfied that no such idea was communicated *by me, or understood by the jury; for they had just been told that they might give the plaintiff's whole demand, or less, according as they should judge that the circumstances of the case would warrant, but there is nothing that will afford the inference that they were told they might give more. Nothing more could have been understood by the expressions used, than that if the sheriff had been guilty of fraud in making the return, he must have done it with a view to defeat the plaintiff's remedy against him for the escape, and could not, therefore, stand before the jury in a very favorable point of view. The amount of the verdict shows that the remarks had not much influence on the jury in estimating the damages.

My opinion, therefore, is, that a new trial ought not to be granted.

LIVINGSTON, J. The contract to deliver the goods having been made with *Potter*, must confer on him a right of action for their non-delivery. It would be without example to deny a party, to whom an express promise is made, whether as trustee, or in his own right, a remedy for its violation. This would produce the singular case of a party's having a right to break an engagement, without responsibility to him with whom it is made, merely because it is possible some other person may have a remedy against him; or, what would be more strange, it would make the very act which consummates the bargain between the shipper and master, that is, the delivery, destroy the remedy of the former on the contract. To whom the goods belong is of no importance, if it be once conceded, which cannot be controverted, that the right of property may be in one, while another, by express agreement, may have a remedy for some negligence or misconduct in relation to it. Whatever, therefore, may have been the right of the consignees in this instance, *Briggs* cannot contest that of the plaintiff, founded, as it is, on his own written agreement. Nor can any one be

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injured by a right of action, for the same wrong, subsisting in different persons at the same time, (which, however inconvenient, must sometimes happen,) as a recovery by one will always bar the other's claim. But a right to sue the master is not only *matter of express contract here, but were it necessary or proper to look beyond the agreement itself, I should say, that it was a valuable one, conferred on the plaintiff by the bill of lading, (not one which he held merely as trustee,) and which we ought not to deprive him of, under an idea of the owner's being changed, as soon as the goods are put on board. That the plaintiff had a right of stopping them *in transitu*, in case of the bankruptcy of the consignees, is conceded. From this will necessarily follow the right of suing the master in the same event, in case of a delivery to the consignees after notice not to make it, or for an indemnity for any misconduct on his part. If he could not, on such occasion, use his own name, it is not probable the bankrupt's assignees would give him an authority to sue in theirs; so that, were the master ever so solvent, he would lose all recourse against him, and be obliged to come in under the commission against the consignees. In *Davis & Jordan v. James*, (5 Burr. 2080.) and in *Moore and others v. Wilson*, (1 Term Rep. 659.) the right of a consignor to sue a common carrier is well settled; though in the first of these cases, some stress be laid on the consignor's paying the carrier, the true ground, which is there taken, and the one on which it ought to be placed, is that of the *agreement*. To determine in whom the right of action is it is better to look to the party to whom the promise is made, than to the person from whom the consideration may proceed. None of the more recent cases, cited by the defendant, impair these authorities. That of *Daves v. Peck*, (8 Term Rep. 330.) which looks a little that way, recognizes them both; and *Buller* takes particular notice, that in those cases there were *special agreements* between the carrier and consignors, which did not appear in the case then decided. I take no notice of several other cases that were cited, because they only relate to the question of stopping goods *in transitu*, and are wholly impertinent to the one before us.

Another point relates to the damages, which are said to be excessive. On the proofs before the jury, I should not have agreed to so large a verdict. But they were the proper judges of *Briggs's* circumstances, and if they thought him *able to pay, the sum they have given is not extravagant, it being about one half of the plaintiff's demand against him. I can hardly suppose the jury gave larger damages on account of the sheriff's false return. The motion, therefore, for a new trial must be denied. On the other point, I concur in the opinion of Mr Justice *Tompkins*.

KENT, Ch. J., and SPENCER, J., concurred in the opinion delivered by Mr. Justice TOMPKINS

New trial granted. (a)

(a) See *Ludlow and another v. Bowne and Eddy*, ante, 1. and *Abbott*, 3d ed. 351. part 3. c. 8. s. 9.

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M'INTYRE against BOWNE.

THIS was an action on a policy of insurance, dated the 26th of June, 1801, on the vessel called the *Marcus*, valued at 3,400 dollars, on a voyage "from New-York to Trinidad, and from thence back to New-York, with liberty to stop and trade at Curaçoa." The cause was tried at the *New-York Sittings*, on the 24th day of April, 1805, before Mr. Justice Thompson, when the jury found a verdict for the plaintiff.

The plaintiff claimed for a total loss, by *barratry* of the master. The broker testified, that at a meeting between the assurer and assured, the latter claimed for a total loss by *barratry*, and exhibited the protest of the captain; that, though no formal abandonment was made, he regarded it as understood and admitted by the parties, who agreed that a new insurance should be effected on the vessel, from *Maracaibo* to *New-York*, for the benefit of whomever it might concern, and without prejudice to the plaintiff's claim on the defendant.

The plaintiff was owner of the vessel, and, by a charter-party, dated the 13th of June, 1801, he granted and let to freight, the said vessel, to two persons of the name of *Aken & Brice*, excepting one half of the cabin, the privilege for 20 barrels for the master and mate, and so much of the hold and fore-castle as was necessary for the accommodation of the master and crew, provisions, &c. *The voyage described in the charter-party was the same as that mentioned in the policy. The plaintiff covenanted to have the vessel ready, and to receive, alongside, such cargo, contraband goods excepted, as *Aken & Brice* should tender, and the vessel could conveniently carry; and to proceed on the voyage described, and that the master and crew should assist in landing the cargo, &c. The owner of the vessel was also to hire the master and crew, and pay all their wages, and the expenses for the voyage.

The charter-party contained the usual covenants, on the part of *Aken & Brice*, as to providing the cargo, and *demurrage*; the whole freight was to be paid at *New-York*, on the delivery of the return cargo. The vessel went to *Trinidad*; and while proceeding, on her return from that island, towards *Curaçoa*, the master, at the request of *Brice*, who was on board and acted as supercargo, changed his course and went to a port on the *Spanish Main*. On its being first proposed by

M. chartered a vessel to A. & B. for a particular voyage, reserving half the cabin, and certain privileges for the master and mate; and covenanted to hire and pay the master and crew, and furnish them with all provisions, &c. The master, at the request of B., who was on board, went out of the course of the voyage, and the vessel was captured by a Spanish privateer. It was held, that M., notwithstanding the charter-party, continued owner of the vessel for the voyage, and that the deviation amounted to an act of *barratry* in the master, for which the insurers on the vessel were liable. (a)

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tion amounted to an act of *barratry* in the master, for which the insurers on the vessel were liable. (a)

(a) *Hess v. Groverman*, 1 Cranch, 214.
Marcadier v. The Chesapeake Ins Co. 8 Cranch, 49.
Gracie v. Palmer, 8 Wheat. 605.
Clarkson v. Edes 4 Cow. Rep. 470

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Brice, the master objected, as being against his orders ; but on *Brice's* agreeing to pay him 100 dollars, and to indemnify him and the owners of the vessel, he consented to go to *Laguira*. The master then went to *Caballo* ; but was ordered the next day to depart, and, afterwards, being near *Curracoa*, he was captured by a *Spanish* privateer, and carried into *Maracaibo*, where the vessel was libelled by the captors, but was afterwards released. The supercargo thereupon sued for damages, and the captors then appealed from the sentence of acquittal. The cargo was taken and sold, and the proceeds deposited in the king's treasury, until the determination of the appeal. The vessel being restored, the master sailed from *Maracaibo*, leaving *Brice* there. The protest of the captain, which had been exhibited among the preliminary proofs, was stated in the case ; and he declared that he went to *Caballo*, in consequence of the request of *Brice*, and his express promise to indemnify both him and the owners from all the consequences of the deviation from the voyage *mentioned in the charter-party : and he entered his protest at *Maracaibo* against the acts of *Brice*.

The judge, in his charge to the jury, stated the inclination of his opinion to be, that the plaintiff, not *Aken & Brice*, must be considered as the owner of the vessel, for the voyage ; and if so, the plaintiff was entitled to recover for the barratry of the master ; otherwise, it was a *deviation* which discharged the defendant from the contract ; but he left it to the jury to decide who was the owner. On giving their verdict, the jury declared, that they considered the plaintiff as owner for the voyage.

Huffman, for the defendant. Two questions arise in this cause ; 1. Whether an abandonment and sufficient preliminary proofs were made, prior to the commencement of this suit ; 2. Who was the owner of the vessel, *pro hac vice* ?

1. The protest of the master, received among the preliminary proofs, negatives the facts of *barratry*, and the defendant ought to be bound by that evidence. The testimony of the broker does not prove any written or *parol* abandonment, but merely that, from the conversation between the parties, he understood that there was an abandonment for a total loss.

2. The most important question is, Who is to be considered as the owner of the vessel for this voyage ? The charter-party is not a mere covenant to carry the goods of *Aken & Brice* ; the vessel is let to freight for the voyage. In the case of *Vellejo v. Wheeler*,† the person to whom this vessel was chartered was considered as the owner, *pro hac vice* ; and Justice *Aston* observes, that where there is a deviation with the consent of the owner of the vessel, and the master is not acting for his own private interest, it is nothing but a deviation with the consent of the owner, and the underwriter is excused. Where a ship is let out to freight generally, the freighter is considered as the owner for that voyage.‡ And *Millar*,§ in distinguishing

† *Cowp.* 143. *S. C. Loft*, 631.

‡ *Marshall*, 431. *Cowp.* 155. *Park*, 89.

§ *Millar on Insurance*, p. 168.

between the *freighter* and the mere shipper of *goods*, *remarks, that the *freighter* either appoints or *approves* of the master, and superintends the whole adventure, and may not improperly be considered as the temporary owner of the ship. Here *Aken & Brice* had the direction of the voyage, and must be considered the temporary owners. If they did not appoint, they approved of the master, and had the direction of him in relation to the voyage. If a vessel is let to a *single person*, it is sufficient to constitute him the *freighter*, or owner *pro hac vice*.† As to the case of *Parish v. Crawford*, ‡ which may be cited on the other side, it may be remarked that the authority of that case is greatly shaken, if not destroyed, by more recent determinations.§ It can scarcely be applicable to the present case, which is on a policy of insurance.

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† *Millar*, 174.

‡ 2 Str. 1251.
more fully re-
ported by Ab-
bott, p. 16.

§ *Abbott*, 18.
James v. Jones,
3 Esp. N. P.
Cas. 27.

Pendleton and Benson, for the plaintiffs. The material question is, Who is to be considered as owner? in order to determine against whom the crime of *barratry* is committed. *Barratry* is any species of fraud, deceit or cheating, by the master or mariners, with intent to injure or defraud the owners.|| It is an act committed by the master, in violation of his duty, in the relation in which he stands to the owners of the ship. The master is responsible for his conduct to the person who appoints him. This responsibility furnishes the true criterion of ownership, as to the question of *barratry*. In the case of *Parish v. Crawford*,¶ this principle is recognized, and the true distinction is taken to be, that he who, by the contract, has the appointment of the master is to be considered as owner, and liable for the acts of the master. This establishes the relation of owner and master, the violation of the duties of which relationship, on the part of the master, constitutes *barratry*. The plaintiff hired the master and crew for the voyage, paid all their wages, and furnished them with all the provisions and necessaries for the voyage. *Aken & Brice* had no control over the master. The vessel was merely let to them to carry their goods, reserving certain privileges for the master and mate, and a part of the vessel for the accommodation of the *master and crew. The ship was not transferred to *Aken & Brice*. It was a mere *covenant to carry their goods*, or to give them the use of the vessel for that voyage. The plaintiff covenants, that certain acts shall be done by the master and crew, in relation to the goods of *Aken & Brice*. This shows that the plaintiff had the entire direction and control of the master and crew, and that this was a mere agreement for the carriage of the goods. Suppose *Brice* had not been on board, would not the plaintiff have been responsible to the shippers for the misconduct of the master? Could any action be maintained against *Aken & Brice* for the master's misconduct? In *Parish v. Crawford*, the appointment of the master was considered as decisive of the *ownership*, and that such owner was liable to *third persons*

|| *Marshall*,
442. 446. 449.
Vellejo v.
Wheeler, Cowp.
155. *Ross v.*
Hunter, 4 Term
Rep. 33. *Moss*
v. *Byrom*, 6
Term Rep. 379.

¶ 2 Str. 1257.

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for the acts of the master. Now what will make him liable to third persons as owner, for the acts of the master, will constitute him the owner, so as to be entitled to his indemnity on a policy of insurance. The *barratry*, in this case, consisted in a wilful and direct breach of orders. But who was entitled to give those orders, and from whom did the master receive them? From the plaintiff, not from *Aken & Brice*. Some confusion has arisen as to the precise meaning of the word *chartering*. Where a person lets the whole of his vessel, so that the hirer has the entire possession and control, this is properly a charter-party. The right of possession for the time is gone, as in the case of the lease of a house for a term of years; (a) the hirer is the *complete owner* for the time, and the *lessor* cannot take possession. But in the loose and common acceptance of the word *chartering*, it is *meant, the letting a vessel to freight to carry goods. This is the present case, and is like advertising a *general ship* for freight, with certain restrictions as to time, &c. In either case, the ownership would remain entire, and the owner would be obliged to furnish a master and crew. In case of a general ship, it is not usual to have a deed, or charter-party; separate bills of lading or contracts are made with the separate shippers. The signing a charter-party, in the present case, can make no difference as to the question of ownership. Might not the plaintiff have maintained *trover* against a third person, who had wrongfully obtained possession of this vessel during the voyage? If the goods had been spoiled, would he not have been answerable for the damage? Had not the plaintiff a right to abandon the ship during the voyage, and to transfer his right of possession to the insurer? In short, are not all the *indicia* and incidents of *ownership* to be found with the plaintiff?

† 3 *Esp. N. P.*
Cas. 21.

‡ 2 *Atk.* 622.

It is said, that the authority of the case of *Parish v. Crawford* has been weakened by that of *James v. Jones*.† But it does not appear how the vessel was chartered in that case. It is a short note of a *nisi prius* decision, and not entitled to much attention. With deference to Lord *Kenyon*, it may be observed, that the true point of inquiry was, not who was the charterer, but who appointed the master and gave him his authority. If the master let the vessel without any authority from the owner, there could be no privity of contract between him and the shippers of goods. In the case of *Paul v. Birch*,‡ Lord *Hardwicke* takes the distinction made in *Parish v. Crawford*. He says, "The money paid to the owner of the ship was improperly termed freight: it was rather for the hire of the

(a) In *Veltajo v. Wheeler*, *Loft*, 640, 641, Lord *Mansfield* observes, "A good deal depends on the nature of the agreement, by the charter-party, whether it is an agreement between the owners and freighters, that the ship shall go to a particular place, or whether it is a letting of the ship to the freighters." "It is material when a ship is let to freight, whether the owners of the goods have not the direction; if it be let, as a house, to the freighter, then the freighter is the owner; if, on the other hand, it is only a covenant between them that the ship shall go that voyage for the freighter, then it is only like a hackney-coach, and the freighter has only the use for his goods, not the direction."

ship, as the *freighter* was at liberty to appoint the master and mariners." In the case of *Moss v. Byrom*,† which is strongly in point, the plaintiff had hired the ship of the owner for a particular voyage. The master took out *letters of marque*, without intending to use them, except in self-defence; but during the voyage, having gone out of his course in order to take a prize, such conduct was held to be *barratry*, because *against his instructions, and contrary to his duty to the owner of the ship, who was responsible to the freighter for any loss happening in consequence of this act. There appears to be some confusion in the case of *Vellejo v. Wheeler*; (a) but if attentively examined, it will appear that *Darwin* had the entire control of the ship, and the circumstance of his being the *general freighter*, and having the direction and control of the vessel, was considered as decisive of his *ownership*, *pro hac vice*.‡ Though the precise question now before the court did not arise in the case of *Kendrick v. Delafield*,§ as the original owner had parted with the possession and control of the vessel, yet the general principle now contended for was recognized by the court.

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† 6 Term Rep.
379.

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‡ Marshall, 455,
456.

§ 2 Caines, 67.

Harrison, in reply. 1. The insured, if he means to sue for a total loss, must comply with one of the terms of his contract, and exhibit his proofs thirty days before the commencement of his action. The only evidence offered in this case, was the protest of the master, which does not prove a *barratry*. There should be proof of the very loss for which he means to claim an indemnity, otherwise this clause in the policy would be perfectly nugatory. The silence of the insurers is not to be construed into an admission of satisfactory proofs. Neither the protest, nor other papers produced, contain *a proof of *barratry*. The fact of a new insurance is not equivalent to an assent on the part of the insurers to the sufficiency of proofs. It was a mere temporary arrangement, made to secure the property for whomever it might concern. Though this is a point of inferior importance in the cause, yet the court ought to give effect to the clause in the policy requiring these preliminary proofs, or it may as well be struck out, as a useless provision.

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(a) Some of the facts in the case of *Vellejo v. Wheeler* are not correctly stated by *Cowper*. By recurring to the report of the same case in *Loft*, 631. and to the other books in which it is mentioned, the facts will be found to be these: One *Willes* was the absolute owner of the vessel, of which *Browne* was the captain; *Browne* chartered the vessel to *Darwin*, for a voyage from *London* to *Seville*, who put her up as a *general ship*, and *Vellejo* and others were the shippers of goods. The captain went to *Guernsey*, and took in brandy, with an intention to smuggle it. The jury, under the direction of Mr. Justice *Ashhurst*, found, that the captain went to *Guernsey* with the privity of *Willes*, the owner of the vessel, but without the privity of *Darwin*, who was owner *pro hac vice*, under the charter-party. *Buller* states, positively, (*Cowper*, 152.) that *Darwin* did appoint the master for this voyage; and from the expressions used by Lord *Mansfield*, that fact is fairly to be inferred. "The question," his lordship observes, "is, What is the ground of complaint against the master? He had agreed to go on a voyage from *London* to *Seville*; *Darwin* trusts he will set out immediately." *Cowper*, 155. See *Loft*, 645.

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2. If *Aken & Brice* were the owners of this vessel, *pro hac vice*, their consent renders the act of the master a mere deviation. If *M'Intyre* be the owner, then the deviation amounts to *barratry*. This is a point of considerable moment, and attended with some difficulty and embarrassment, on account of the apparent obscurity in the authorities which have been cited on the subject. Ownership may exist in different persons, at the same time, for different purposes. In regard to land, the lessor is considered as owner for one purpose, as in case of *waste*; and the *lessee* for another, in regard to his term. The plaintiff, as the general owner, could have his right of action, after the termination of the voyage, against *Brice*, for any mismanagement, or misuse of the vessel. It does not follow, however, that he is to be considered as owner in every case. Though as general owner he has let the vessel, yet, for some purposes, and particularly in regard to insurance, *Aken & Brice* may be considered as owners, *pro hac vice*. None of the writers on insurance have cited the case of *Parish v. Crawford*; neither *Park*, *Millar* nor *Marshall*, though the latter published his *Treatise* the same year in which *Abbott's* book appeared. It is very remarkable, considering the great industry and research of these writers, that this case, if it had any application to the subject of insurance, should have been wholly overlooked by them. It may fairly be inferred, that they considered it as applicable only between the *shippers of goods*, and *ship-owners*. But, supposing it was applicable to a case of insurance, it may be said, that it was decided when the science of commercial law in *England* was in its infancy, and that it has been overruled by the recent decision *of Lord *Kenyon*, in the case of *James v. Jones*.† True, that was a decision at *nisi prius*, but it was made by a very learned and experienced judge; and it does not appear that any application was ever made for a new trial, or that the correctness of his opinion has ever been questioned. The case of *Vellejo v. Wheeler*,‡ is the leading case on this subject, in relation to insurance. *Browne* chartered the vessel to *Darwin* for a voyage, not for a term of years. It was a general ship, put up for a voyage from *London* to *Seville*. A person may take up the whole vessel as a general ship, or he may charter her, which is different. It is better to take a charter-party, than to fill up a vessel as a general ship. *Browne*, the master, was not appointed by *Darwin*, who had the same power over the master and crew that *Aken & Brice* had in the present case. Here is a charter-party which imports a hiring for the voyage; and *Aken & Brice* had a vested interest in the vessel for the voyage; they had a perfect right to go on board, to take possession of the vessel, and sail in her, without paying any thing for their passage. But had this been a mere contract for the carriage of goods, *Aken & Brice* would have had no right to take possession of the vessel. The reservation of half the cabin

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† 3 Esp. N. P. Cas. 21.

‡ Cowp. 143.

and the *privilege* of the master and mate, can make no difference. *Aken & Brice* were no less the *owners, pro hac vice*. They took possession of the vessel *let* to them by the plaintiff, subject to this reservation, which is a matter of usage, in all foreign voyages. By the charter-party, *Aken & Brice* had the order and direction of the vessel. They were to pursue the voyage in the manner they thought best. They had liberty to touch and trade at *Curracoa*. If the master had died, might not *Brice* have appointed another? If any person had wrongfully taken possession of this vessel during the voyage, might not *Aken & Brice* have brought their action against him? The *general freighter* is clearly the *owner, pro hac vice*. The *general affreightment*, or letting to hire of the entire vessel, is, then, the true criterion of *ownership*. It is the principle on which the case of *Vellejo v. Wheeler*, and all the subsequent decisions, are founded. *A lessee for years is *owner* of the land during the *term*. Suppose he covenants with the lessor or reversioner that he will employ a particular steward or servants on the farm appointed by the lessor, would he be less the owner on that account? The appointment of the master in this case by the plaintiff, does not vary the question. Though appointed and paid by *M'Intyre*, he was bound to follow the directions of *Aken & Brice*, during the voyage. In the case of *Moss v. Byrom*,† which has been cited on the other side, it does not appear that either party assented to the acts of the master. His cruising was an act perfectly and exclusively his own. The plaintiffs had hired the vessel from the agent of the owner, for a trading voyage: and it being a charter, or general affreightment of the ship, the plaintiffs were deemed owners, *pro hac vice*, and the conduct of the master was regarded as *barratry*.

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THOMPSON, J., delivered the opinion of the court. The loss claimed in this case is for the *barratry* of the master, and the right of the assured to recover will depend on the determination of the question, Who is to be deemed owner of the vessel for the voyage? It is not denied that the conduct of the master amounted to *barratry*, provided the assured is to be considered as owner of the brig, for the voyage insured. The plaintiff was the owner, but he had chartered the vessel to *Aken & Brice*, who, it is contended, must be considered owners, *pro hac vice*; and the acts of the master, which are alleged as *barratrous*, having been committed by the procurement, orders and directions of *Brice*, one of the hirers, would not constitute *barratry*. It appears that the assured equipped the brig, hired and put on board the master and crew, and paid them, furnished the provisions and other necessities for the voyage. There was also excepted out of the charter one half of the cabin, and the privilege for twenty barrels, on account of the mate and captain, and so much of the hold as might be neces-

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sary for the accommodation of the master, mariners, provisions, water and fuel for the crew. Under such circumstances, I should not consider *Aken & Brice* as owners for the voyage. By the *charter-party, the owner of the vessel covenants to carry and deliver the goods; he is, therefore, responsible for the conduct of the master and crew; and if there be a failure of delivery, by reason of their misconduct, he is accountable. The plaintiff retained the control and management of the vessel, and was bound to keep her furnished with a competent crew. *Barratry* is something contrary to the duty of the master and mariners; the very terms of the definition imply, that it must be in the relation in which they stand to the owners who are their employers, and whose orders they are bound to pursue. I apprehend the distinction to be, that where, by the terms of the charter, the ship-owner appoints the master and mariners, and retains the management and control of the vessel, the charter is rather to be considered as a covenant to carry goods; but where the whole management is given over to the freighter, it is more properly a hiring of the vessel for the voyage, and in such case the hirer would be deemed owner, *pro hac vice*. (2 Atk. 621. *Paul v. Birch*.) This appears to me to be a rational distinction, and one that is in no way contradicted, but rather supported, by the case of *Vellejo v. Wheeler*, (Cowp. 142. Marsh. 455, 456.) so much relied on by the defendant's counsel. According to *Marshall's* report of that case, the court laid down the distinction above taken, and considered the person having the control of the vessel as owner; that if a ship be let out generally to freight, the freighter is owner for that voyage; but if there be only a covenant to carry goods, the owner of the ship would have the *direction of her, and the hiring of the master and mariners*. In *Cowper's* report of the case, it is stated by counsel, and not contradicted, that *Darwin*, the freighter, *did appoint the master for the voyage*; and Mr. Justice *Aston*, in delivering his opinion, says, "The hulk of the ship belonged to *Willes*, but he had nothing to do with it, having chartered it to *Darwin*, and so the jury did right in considering him owner, *pro hac vice*."

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Another question raised, though not much pressed on the argument of this case, related to the sufficiency of the preliminary proofs. This objection appears to me not well *taken. The claim by the assured, when he abandoned, was for a loss by the barratry of the master, and he exhibited as preliminary proof of that loss, a paper purporting to be the heads of a protest by the master, and also a letter from the master to the plaintiff. The protest states, how *Brice*, the supercargo, interceded with, and eventually prevailed on, the master to do what is admitted to amount to barratry. In addition to which, it was proved that the abandonment was for barratry; and the witness understood the underwriters, as being satisfied with the preliminary proofs which had been exhibited, and it was

thereupon agreed between the parties, that the plaintiff might make a further insurance, without prejudice to his claims against the defendant; and that if the insurers on the original policy were liable, such new insurance should be for their benefit. Under such circumstances, even admitting the documents exhibited, not to have been competent preliminary proof, I should consider the underwriter as having waived his claim to more formal proof, and as admitting the loss as stated in the heads of the protest, for the purpose of bringing up the question whether the circumstances would warrant a recovery for *barratry*. It would, I think, be extremely rigorous to turn the plaintiff round to a new action on account of an objection, which must be considered as merely formal.

The opinion of the court, therefore, is, that the plaintiff is entitled to recover as for a total loss.

Judgment for the plaintiff.(a)

(a) See *Earl and others v. Rowcroft*, (3 East, 126.)

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THIS was an action on a policy of insurance, dated the 31st of *December*, 1796, on the vessel called the *Peggy*, at and from *Turks Island* to *New-York*. The plaintiff declared for a total loss, by the perils of the sea. The cause was tried at the *New-York Sitings*, April, 1805, before Mr. Justice Thompson; and the defendants demurred to the evidence produced on the part of the plaintiff.

The mate of the *Peggy*, who was examined under a commission, deposed that she remained at *Turks Island* three days, and sailed from thence on the 12th of *November*, 1796, laden with salt for *New-York*. When she sailed from that island, she was in every respect seaworthy, and competently equipped. In the evening of the day of her departure, she was boarded by a boat from a *British* ship of war, the *Severn*, the officer of which took out three of the seamen belonging to the *Peggy*, but promised to return the men, or send an answer. The *Peggy* lay to until 8 o'clock, P. M., when the *Severn* made sail, without returning the men or sending an answer. The captain of the *Peggy* then stood to the northward, in order to get into the road of *Turks Island*, for the purpose of procuring three seamen to replace those which had been impressed, and which were necessary to the safe navigation of the vessel. About 1 o'clock in the morning of the next day, the mate heard the watch on deck say, that the vessel was *water-logged*; and on sounding the pump, three and a half feet of water appeared in the hold, which it was believed was made between

If a vessel be seaworthy at the time of her sailing, and afterwards suddenly spring a leak, and founder without any stress of weather, or apparent cause, it is a loss by the perils of the sea, and the insurers are liable. Whether the vessel was seaworthy or not, is a question of fact for the jury to determine. On a demurrer to evidence, the court will infer every fact which the jury could have done, had the cause been left to their decision.

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the hours of twelve and one, as the witness had tried the pumps at twelve, and found the vessel tight. Every endeavor was made, without effect, to free the vessel; and the water increasing very rapidly, signals of distress were made, as the vessel was near the island, but heavy squalls of wind and rain prevented their receiving any assistance. The crew, finding the vessel ready to sink, took to the boat, and reached *Salt-Key* island, to the leeward of grand *Turks Island*. The *Peggy* sunk soon after *they left her; she floated, however, afterwards, owing, as was supposed, to the melting of the salt; and the crew went to tow her in, and found some wreckers had been out and stripped her of her sails, rigging, &c., but were unable, on account of the weather, to get her into *Turks Island*. The witness, on his cross-examination, further deposed, that the loss was occasioned by "a sudden springing a leak, and not by storms, violent winds, currents, or accidents of the sea." It further appeared in evidence, that the *Peggy* was built of good oak timber, at *Boston*, in the month of *November*, 1794; that in the summer of 1796, she underwent some repairs at *New-York*, and that when she sailed, about the first of *August*, 1796, from *New-York*, to the *West Indies*, she was seaworthy. The defendants admitted that she was seaworthy at the time she left *New-York*. Another witness testified, that in the year 1800, while on a passage from *New-York* to *Great Britain*, the ship of which he was the master suddenly filled with water, and foundered immediately after she was abandoned. That he believed the ship to be perfectly staunch and strong; that such an accident might happen to the best vessel; and it might have proceeded from her striking a rock, or sunken logs, or from having been struck by a fish.

Pendleton, for the defendant. On the former motion for a new trial in this cause, the court(a) unanimously decided, that if a vessel suddenly sinks, without any visible or adequate cause to produce such an effect, the presumption of law is that she was not seaworthy. This principle is laid down by *Marshall*† and *Park*,‡ on the authority of the decisions which have taken place in *England*. The same doctrine is maintained by all the foreign writers on this subject.§ In *France*, where, by a particular ordinance, a previous survey is necessary, before a vessel proceeds on her voyage, it has been held, that such survey raised a *presumption*, that the vessel was seaworthy, and proof of her not being seaworthy was *thus thrown on the insurers. The insurers are responsible only for accidents arising from the perils of the sea, and not for any latent defect of the ship. The declaration, in the present case, states the loss to have happened by the perils of the sea; yet the deposition of the mate, the only witness as to the loss, ex-

† *Treatise on the Law of Insurance*, p. 367.

‡ *System of Marine Insurance*, 229.

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§ *Casaregis*, disc. 142. n. 15.
Valin, art. 28,
29. 46. p. 76. 98.
Emerig, vol. 1.
p. 575. 577. 580.

(a) *January term*, 1802. Decided by *LEWIS*, Ch. J., *KENT*, J., and *RADCLIFF*, J. *THOMPSON*, J., having taken his seat on the bench after the argument, declined giving his opinion.

pressly negatives that idea. The legal and necessary inference, therefore, is, that she was not seaworthy at the time the voyage commenced at *Turks Island*.

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Harison, for the plaintiff. (*Wells* on the same side.) This cause comes before the court under circumstances different from those in which it was presented on a former occasion. Then it was on a motion for a *new trial*. Now there is a *demurrer to the evidence*. The evidence, also, as to the age and built of the vessel, and that she was seaworthy when she left *New-York*, was not adduced on the former trial. In a case made, the court may draw inferences. Where there is a *special verdict*, the court are bound to take facts precisely as they are found by the jury. But on a *demurrer to evidence*, the truth of all the facts which the jury *might* or *could* infer from the evidence, are admitted,^(a) and the court may make any inference which the jury *could* have done, had the cause been suffered to go to them. Here the defendants, by their demurrer, have taken the cause from the jury, and having put themselves in this situation, they must bear its disadvantages. The plaintiff is, by law, entitled to all the benefits of this demurrer, in which the defendants have compelled him to join. If no visible or external cause of the accident appear, the jury may draw the inference as to the cause of loss.^(b) The vessel was not two years old; she had been thoroughly repaired before she left *New-York*, and it is admitted she was seaworthy at the time she sailed. There is no evidence, whatever, of any internal defect. The mate testifies that the wind was boisterous, and that there was a heavy sea, when the vessel filled with water. The weakness of the crew was probably the cause why the vessel could not be kept free, and the bad weather prevented all assistance from the shore. If there be any apparent contradiction in the evidence, it was the province of the *jury to reconcile it. Would they not, under all the circumstances, have been justified in the inference that the vessel was seaworthy, and that she was lost by the perils of the sea? If they might have made that inference, the court are bound to do the same; for to decide in favor of the defendants, the court must believe it utterly impossible for the jury to make the inference. In the case of *Eden v. Parkinson*,† Lord Mansfield observes, that "it is an implied warranty, that every ship insured must be tight, staunch and strong; but it is sufficient if she be so, at the time of sailing. She may cease to be so in 24 hours after her departure, and yet the underwriter will continue liable." The case of the *Mills* frigate,‡ is the † *Doug.* 732. ‡ *Park.* 222

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(a) See *Cocksedge v. Fanshaw*, *Doug.* 119. *Gibson and Johnson v. Hunter*, 2 *Hen. Black.* 287. See also a note, p. 297. of the 6th edition of *Park on Insurance*, as to the effect of a demurrer to evidence. But see *Lewis v. Few*, 5 *Johns. Rep.* 1.

(b) In the case of *Munro v. Vandam*, tried at the sittings before Ld. Kenyon, in *Michaelmas* term, 1794, it is said, the jury may draw the conclusion as to seaworthiness. See note, *Park*, 229. 6th ed.

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leading case from which all the doctrine about *seaworthiness*, in the *English* courts, has originated. If the circumstances of that case are attentively examined, it will be found to be much stronger for the defendants, than the one now before the court. The *Mills* frigate sprung a leak without any bad weather; it was found, also, that her bolts were so rusty, that they could not hold the planks. Yet it will be seen, by adverting to the last edition(a) of Mr. *Park's Treatise on Insurance*, that judgment was given in the Exchequer Chamber, on a demurrer to the evidence, in favor of the *assured*; which judgment was afterwards *affirmed*, in error. (b)

Riggs, in reply. On a demurrer to evidence, the court may make every inference, which the jury could *rightfully* draw; not every possible inference which might be drawn by them. The evidence now before the court is, as to every material point, the same as was presented when the motion for a new trial was granted. Is it possible that the court can now decide that the jury might have *rightfully* and fairly inferred that the vessel was *seaworthy*? If the evidence then before the court did not warrant such an inference, it cannot, at this time, justify that conclusion. It is stated that the vessel was *seaworthy* when she left *New-York*, but it does not, therefore, follow that she was so three or four months after, at *Turks Island*, where the voyage insured commenced. The propriety of the former decision of the court, in this cause, seems to be questioned.

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* *Court*. We shall adhere to that decision, unless a demurrer to evidence, or any new facts, make a difference in the case.

LIVINGSTON, J. Whatever doubts may have once existed in *England*, respecting an underwriter's liability, in case of a vessel not being *seaworthy*, when the risk commences, it is now well settled there, as well as in every other commercial country, of whose laws we have any knowledge, that this is an implied warranty in every contract of insurance. If it, however, turns out, that she is not so, or in other words, not in the condition to encounter the ordinary perils of the voyage proposed, the policy is without consideration, and void. Though this is the law, about which there is no dispute, it must be very diffi-

(a) 5th edition, p. 228. In his third edition, Mr. *Park* stated, that the judgment was given for the underwriters; but in his last edition, (the 6th,) p. 296. he says, the ground of decision was, that the court thought the evidence did not precisely prove that the ship was not *seaworthy* at the time of the insurance taking place; but only that she was so at the time of sailing.

(b) *Marshall*, 371. 1st ed. He takes the case from *Park*, probably from the earlier editions. In a note, he observes, that an action on the same policy was tried in the *Common Pleas*, before Lord *Camden*, who directed the jury to find for the plaintiff; but on a motion for a new trial, he altered his opinion, and the court unanimously determined, that the ship, not being *seaworthy*, the plaintiffs, however innocent, could not recover. But see 2d edition of *Marshall*, 161. 163. The first edition of *Marshall on Insurance* was published in the same month with the 5th edition of *Park*.

cult, in many cases, to show the state of a vessel, at the commencement of a voyage, with sufficient certainty to satisfy a jury that she was seaworthy; for it is admitted, if she be so then, it is enough, whatever may be her condition immediately after. This is purely a question of fact, and, like all others, will sometimes admit only of circumstantial proof; if there were any evidence now, from which a jury might have drawn this conclusion, it must be considered as admitted by the demurrer,[†] and that, too, without any scrupulous inquiry, whether such inference would be correct or not; for courts should not encourage this practice. It is not only productive of considerable delay and expense, (for this action is already in the eighth year of its existence,) but unless all inferences are admitted, which a jury might have drawn, judges, instead of confining themselves within their province of deciding on questions of law, will also become triers of every matter of fact. If this be the rule in examining testimony, when brought up by a demurrer, who can say that a jury might not, and very correctly too, have been of opinion, that the *Peggy* was seaworthy when she sailed from *Turks Island* for *New-York*? The mate swears positively to this fact, when he says, "that she was then tight, strong and stanch, and competent, *in point of strength and ability, to her intended voyage, and that she had a sufficient crew, and was well supplied with provisions and other necessaries." Here are all the ingredients of seaworthiness.

Two other witnesses depose, that they repaired the *Peggy*, in the summer preceding her loss in *November*; that she was tight when she went out of their hands, and that they thought her seaworthy. She was built too of very good oak timber, and was only two years old when lost; in addition to this, it is admitted by the defendants, on the record, that she was seaworthy, only three months prior to the shipwreck. If the jury, on this positive testimony of the mate, and on the circumstances of her being a young vessel, built of durable materials, of her being admitted seaworthy only three months before her loss, and on the general presumption that every vessel is so, until the contrary appears, might not very fairly have found for the plaintiff, I hardly know what would have justified their so doing.

In opposition to all this, it is said, she was lost the day after sailing, "without any stress of weather, or apparent cause or accident," and that, then, the fair and natural presumption is against her being seaworthy. Without controverting or acceding to this proposition, which must frequently bear very hard on the assured, it is not true, in point of fact, that her loss cannot be ascribed to any apparent cause or accident; and if it were so, it would only throw on the insured the *onus* of showing (which, as has been stated, the jury may very fairly have thought was done) that, at the time of her departure from *Turks Island*, she was in truth seaworthy. But there is

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† *Doug.* 119.
2 *Hen. Black.*
187.

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no occasion to have recourse to these inferences, because the mate expressly ascribes the loss to a "*sudden springing of a leak*;" and will it be denied, that springing a leak is a peril insured against, or, in face of the positive declaration of another witness, who was a seafaring man, that it may happen to the best vessel, and in mild weather? I am not prepared to push to this length the doctrine of seaworthiness, *(which, as it respects an innocent shipper of goods, has nothing to recommend it,) being very clearly of opinion, that every accident that can be traced to *the sudden springing of a leak*, whether in a calm or storm, or whether after a short or long absence from port, is a loss within the policy, and is not, of itself, evidence of an unworthy or insufficient vessel. The plaintiff must, therefore, have judgment.

THOMPSON, J., SPENCER, J., and TOMPKINS, J., concurred.

KENT, Ch. J. The question is, whether the plaintiff is entitled to recover, upon the testimony he has produced, and to which the defendants have demurred.

A verdict was taken for the plaintiff in this cause, upon the same evidence, in *April*, 1801; and at *January* term, 1802, a new trial was awarded, because the law will intend a want of seaworthiness, when no visible or rational cause of the loss appears, or any other than some latent and inherent defect in the vessel.

The vessel, when she sailed from *Turks Island*, ought to have been *tight, staunch and strong*, and competent to resist the ordinary action of the winds and waves, during the voyage insured. The question is, What will the law presume, when she suddenly springs a leak, within a few hours after her departure, "without its being occasioned by storms, violent winds, currents or accidents of the sea?" I continue of the opinion given, when the new trial was awarded, that the law will presume the vessel not seaworthy; and such is the conclusion which the law draws from the testimony before us.

There is but one *English* decision that relates in any material degree to the subject, and that is the case of the *Mills* frigate, in the Court of Exchequer. (*Park*, 222.) In that case, there was also a demurrer to the evidence. The principal fact was, that the frigate sailed from *Nevis* in the *West Indies*, for *London*, on one day, and on the next, she sprung a leak by starting a plank, without any bad weather, or extraordinary swell of the sea. The *judgment of the court was in favor of the insurer; and on a writ of error to the Exchequer Chamber, it was always understood, until very lately, and so stated in all the books, that the judgment was affirmed; but Mr. *Park*, in the last edition of his work, observes, that he has now discovered to the contrary. Be that fact as it may, the Court of C. B., on the same policy and facts, decided, as the

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Court of Exchequer did, that the frigate was not seaworthy. Under the peculiar history of the report of that case, and the different decisions upon it, its authority, if not much impaired, cannot be considered as unfavorable to the defendants.

Marshall is decidedly of opinion, (p. 367.) that where a ship is lost, or incapable of proceeding on her voyage, and this cannot be ascribed to stress of weather, or any accident on the voyage, the fair and natural presumption is, that she was not seaworthy; and it is incumbent on the insured to show, that at the time of her departure, she was in fact seaworthy; that it is a wholesome rule, that the insured should be held to pretty strict and cogent proof of this. If, on the other hand, it appear from the facts in the case, that the loss may be fairly attributed to sea damage, or any other unforeseen misfortune, the *onus probandi* will lie on the insurers, if they allege that the ship was not seaworthy.

This opinion is supported by that of *Casaregis*, and by a decision of the *Rota of Florence*, in 1726, in which it was decided, that the assured was bound to prove affirmatively, that the loss happened by one of the perils insured against, otherwise, the *innavigability* of the vessel, from inherent defects, would be intended. (*Marshall*, 365.) The same presumption is adopted by *Valin*; (vol. 2. p. 103.) but the *French* law had, in part, at least, drawn a different conclusion from one of the articles of the ordinance of 1682, relating to freight, (*Ord. de la Mar. tit. du fret*, art. 12.) and which had nothing to do with the question of insurance. The deduction drawn from that *article was, that every ship was presumed seaworthy at the time of her departure, and that it lay with the opposite party to prove the contrary. To prevent the abuse of this presumption, of which the insurers were too often the victims, the ordinance of 1779 was passed, requiring a survey previous to every voyage; since that time the presumption, either the one way or the other, depends entirely upon the fact of the previous survey. *Emerigon*, however, observes, that this construction of the article on freight was but in part adopted by the *French* law, and in the eight cases which he reports, as argued and adjudged on the question of seaworthiness, a previous survey seemed generally to be the cause of turning the presumption against the insurers. (1 *Emerigon*, 374. 576 to 591.)

I am, therefore, of opinion, that judgment ought to be rendered for the defendants.

Judgment for the plaintiff.(a)

(a) See *Talcott v. The Comm. Ins. Co.* (2 Johns. Rep. 124.) *Haff v. The Comm. Ins. Co.* (4 Johns. Rep. 132.) *Garrigue v. Cox*, (1 Binn. Rep. 552.)

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If the port to which a vessel is destined, as described in a policy of insurance, be actually blockaded, the assured may abandon as for a total loss. The interdiction of commerce with the port of destination, by means of a blockade, is a peril within the policy; and the going to another

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port afterwards, for the purpose of delivering the goods, was considered, after an abandonment, as done for the benefit of the insurer. The acceptance of the goods at another port by the consignee, under the circumstances of the case, and from necessity, is an act done for the benefit of all concerned, and does not prevent the assured from recovering for a total loss on the abandonment.

THIS was an action on a policy of insurance, dated the 5th July, 1803, on thirty-five bales of cotton, valued at 1,800 dollars, at and from *New-York* to *Hamburg*, on board of the *American* ship *Orozimbo*. The cause was tried at the *New-York* Sittings, on the 27th day of April, 1805, before Mr. Justice Thompson. The policy contained the following clause: "And that in case of loss, the assured are to abate two per cent. and such loss to be paid in thirty days after proof thereof; but no partial loss, or particular average shall in any case be paid, unless amounting to five per cent." It contained, also, the clause, authorizing the assured, their factors, servants and assigns, to sue, labor, and travel for and about the defence and safeguard of the goods insured.

*The material facts proved at the trial, were the following: On the arrival of the ship on soundings, in the *English Channel*, she was boarded by an officer of a *British* ship of war, the commander of which informed the master of the *Orozimbo*, that the *Elbe* was blockaded, and endorsed one of his papers, forbidding him to proceed thither. When off the *Isle of Wight*, she was again boarded by an officer of another *British* ship of war, who endorsed the register, and forbade the master of the *Orozimbo* from proceeding to *Hamburg*, under the penalty of being made a lawful prize; but strongly advised him to go into *Portsmouth*, and take the advice of the agent of the ship-owner, how to act for the benefit of the ship and property. The master of the *Orozimbo* accordingly went into *Spithead*, where he received a letter, dated the 29th August, 1802, from a Mr. Wilson, agent of the ship-owner, recommending to him "to go to *Embsen*, as the nearest neutral port to *Hamburg*." The *Orozimbo* arrived in the *Road of Embsen*, the 9th of September, and the master gave immediate information of his arrival to the owner at *Hamburg*; but did not receive orders to unload the cargo until the 23d of September. The cargo was regularly delivered in good order, at *Embsen*. The bills of lading were there produced, and discharged by the agents of the consignees of the goods, and were forwarded to *Hamburg*, to the ship-broker there, who collected the freight. It appeared, from a letter dated at *Hamburg*, the 13th of September, 1803, written by the owner of the ship to the master, while at *Embsen*, that he had great difficulty in persuading the consignees to receive the goods at the latter place, as they wished the ship to deliver them at *Lubeck*; that they finally consented to receive them at *Embsen*, and to pay all expenses in consequence of going there.

While at *Embsen*, the ship received considerable damage

in her hull, spars and rigging, from being run foul of by another vessel, in a severe gale of wind. There was also an account for charges and expenses in consequence of being obliged to go into *England*. A general average of these damages was settled at *Emden*. The evidence of the average *loss, however, had not been exhibited to the defendants, with the other preliminary proofs. The defendants moved for a nonsuit, which was overruled by the judge. The plaintiff then offered to prove, that it was generally understood at *New-York*, at the time the *Orozimbo* put into *Spithead*, that *Hamburg* was blockaded. This evidence, though objected to, was admitted. A witness testified, that he had received a letter from his correspondent at *Hamburg*, in the autumn of 1803, stating that *Hamburg* was blockaded, which fact, the witness believed, was generally known at *New-York*. The plaintiff claimed a total loss, and also fifty-seven dollars and ninety cents, being the proportion of the average loss, settled and paid at *Emden*. The jury, under the direction of the judge, found a verdict for the plaintiff, on the first count on the policy, for a total loss; and on the count for money paid, laid out and expended, for the amount of the average loss. On the third count in the declaration, for money had and received, a verdict was entered for the defendants.

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Hoffman was proceeding to open the argument on the part of the defendants, when *Radcliff* asked for the *points* on which he meant to insist. *Hoffman* said they had been delivered to the court, and that was sufficient.

The Court. By the present practice, it is enough if the points are handed to the court when the cause is called. The leading counsel must state the points in the course of his argument, and it is not required that they should be delivered to the opposite counsel, with the copy of the case. But, for the sake of convenience, the court now decide, that the rule of practice in future shall be, that the opening counsel, before he begins his argument, must deliver in writing to the opposite counsel, the points on which he means to insist.

The counsel opening the argument of a cause, must deliver to the counsel on the opposite side, the points on which he means to insist.

Hoffman. On the part of the defendants, it will be contended, 1. That there was not sufficient evidence to show that *Hamburg* was blockaded; but, admitting that fact, there was no loss within the terms of the policy. 2. Supposing that the insured were justifiable in not proceeding to *Hamburg*, still the voyage was not thereby lost, as the *insured were bound to go to the nearest port of safety. 3. The acceptance of the cargo at *Emden*, by the *consignees*, precludes all claim for a total loss. 4. The evidence of a *partial loss* was inadmissible, and insufficient. 5. The verdict was against law and evidence.

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If the plaintiff is entitled to recover in this case, it must be
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on some very strict rule of law, not from any principle of justice. The master of the *Orozimbo* states, that he was informed by the *British* cruisers, that the *Elbe* was blockaded; but mere information of a blockade ought not to prevent the insured from proceeding to his port of destination, since, before his arrival off the port, it is possible that the blockade, if existing, may be raised. No case is to be found, in which it has been decided, that the fact of being turned away from a blockaded port, is a loss or peril within the policy; or that a mere apprehension of a blockade would justify the insured in leaving his course to the place of destination, and going to another port. But a late adjudication in the *English* courts, somewhat analogous to the present, is very strong in favor of the defendants, to show, that such an event is not a peril for which the insurers are responsible. It is the case of *Hadkinson v. Robinson*, (3 *Bos. & Pull.* 388.) A vessel laden with fruit sailed from *Lisbon*, under convoy, destined to *Naples*; but on receiving intelligence that the ports of the king of *Naples* were shut against the *English*, they went into *Minorca*, where the cargo was sold. The Court of Common Pleas gave judgment for the defendant, and intimated pretty strongly their opinion, that the shutting of a port against the vessel insured, was not a loss within the policy.

Admitting, however, that the master was justifiable, under existing circumstances, in not going to *Hamburg*, still the voyage was not lost, as he might go to the nearest port; for if necessity prevents the insured from reaching the place of destination, he may go to the nearest port he can reach in safety. But the acceptance of the cargo at *Embsen*, by the consignees, is conclusive against the plaintiff, and he cannot claim a loss on the policy. If the consignee had refused *to receive the goods at *Embsen*, they might have been sold for the benefit of all concerned, and the insured would have had some ground for a claim against the defendants. Here the agent of the insured, after full deliberation and reflection, received the cargo, and paid the freight. On what pretence, then, can the insured assert his demand? As the plaintiff claimed for a total loss, the evidence of the partial loss at *Embsen* was inadmissible. But if properly admitted, it was insufficient. If the insured meant to have proceeded for gross average, he ought to have exhibited this evidence among the preliminary proofs. The rules of settling averages at *Embsen* are different from those adopted here; and the jury ought not to have been directed to take the former as the measure of the damages.

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Radcliff and *T. L. Ogden*, for the plaintiff. The turning away from a blockaded port by a belligerent, is comprehended under the description of the *restraints of princes*, and is clearly a peril within the policy. The language used in the policy is the most general and comprehensive that could be devised.†

† *Marshall*, 237.
434. *Park*, 24.
Molloy, book 2.
c. 7. s. 7.

The restraint of neutral commerce by belligerents, in preventing their entrance into a blockaded port, is, as Sir *William Scott* observes, "a high act of sovereignty."[†] The case of *Hadkinson v. Robinson*,[‡] which has been cited, is in favor of the plaintiff; for it is not pretended that a prohibition to enter the destined port, was not a peril within the policy. That case turned, however, upon the effect of the memorandum in the policy, as to perishable articles. The true question is, Was there, in this case, a blockade? The blockade is to be ascertained in two ways; first, by the *simple fact*; second, by a *notification* of the fact.

[KENT, Ch. J. This court have decided, that there must be evidence of a blockade in fact. A mere notification amounts to nothing. §]

There was legal evidence of a blockade in fact. Letters from *Hamburg* state the existence of the blockade. Two of the belligerent cruisers successively intercepted the *Orozimbo*, and notified the master of the blockade, and prohibited *him from proceeding to that port. Suppose, however, that the *Elbe* was not actually blockaded, was it not the duty of the master, knowing the rigorous principles on which *British* courts of admiralty proceed as to blockade, to have turned aside, after the information and inhibition he received? Ought he to have proceeded afterwards, and exposed the property intrusted to his care to seizure and condemnation? His deviation was perfectly justifiable. In the language of Lord *Alvanley*, || the peril acted immediately on the subject insured. The master was forbidden by two cruisers from going to *Hamburg*. It is, therefore, distinguishable from the case of *Hadkinson v. Robinson*. Here the ship proceeded until she was stopped, and forbidden to prosecute her voyage under the penalty of confiscation. The master was under the *restraint of an armed force*; and he acted with prudence and discretion in turning aside, to avoid exposing the property to confiscation. But, it is said, he ought to have proceeded farther, and had he been captured and condemned, then there would have been a clear loss within the policy. But should we not, then, have been told of the *violation of a blockade*? ¶ Again, it is said, that the assured ought to have gone to *Emden*, or the nearest port. It is sufficient, when under the pressure of necessity, if the master act with due discretion, and for the interest of all parties. He was strongly advised to go to *Portsmouth* for directions, and that or *London* was the nearest port. In fact, he went to *Emden*, as clearly the best port for all concerned. The insurance was to a particular port or market. The insured was prevented by a superior power from reaching that port, and from believing the goods there. He is forced into a different port, in the territory of a different sovereign, governed by different laws; he has lost the market, and all the expected benefits of the voyage. The voyage is thus *defeated and lost*, and the plaintiff had a

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† *The Henrick and Maria, Rob.*
vol. 1. p. 148.

‡ *Bos. & Pull.*
388. See also
Dyson v. Rose-
croft, same
book, p. 474.

§ *Williams v.*
Smith, 2 Caines,
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|| *Hadkinson v.*
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¶ *Vos & Graves*
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Caines's Cases
in Error, p. 8.

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right to abandon. The right to abandon in case of *embargo* is not doubted.† The peril in this case is equally a just cause of abandonment; and the loss has continued total; for the blockade continued, and it does not appear *what became of the goods, after they were landed at *Embden*, or whether they ever reached *Hamburg*h.

The acceptance of the goods at *Embden* is urged as conclusive against the plaintiff. A consignee is the agent of the shipper, to receive his goods at the place of destination. If he assumes to receive them in another place, he becomes the agent of all parties. To render his acts binding on the consignor, they should be voluntary. Here he had no volition, nor choice. The master could not go to *Hamburg*h, and refused to deliver the goods at *Lubeck*, where the consignee wished to receive them. The master might have put the goods on shore, so as to be entitled to freight. The acceptance of them by the consignee's agent at *Embden*, was compulsory, and *under protest*. He acted for the interest of all parties; he was bound to pay the freight, take the goods, and dispose of them in the best manner, for the benefit of all concerned. The discharge of the bills of lading was a usual and necessary act, on the delivery of the goods. After the abandonment, the property was at the risk of the insurers; and it is incumbent on them to show what became of it, after its delivery at *Embden*. Under all these circumstances, the plaintiff had a right to say to the defendants: "You undertook that my goods should arrive at *Hamburg*h. They have been prevented, by one of the perils mentioned in the policy, from arriving at that port. I have lost the market and the object of my voyage, and you must now indemnify me for that loss."

In answer to the objection, of the want of the preliminary proofs, in regard to the proportion of general average, settled at *Embden*, it may be said, that by refusing to accept the abandonment, the insurers waived these proofs, and put the party to his right. Those proofs, in fact, are not necessary, where the party claims on the count for money paid to the use of the defendants.

[*Court.* Can you recover for a total loss and an average loss at the same time?]

The insured may recover for a total loss, and for expenses, as money paid and expended for the benefit of the insurers.

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*The expenses, or average, is, then, a matter incidental and collateral to the right of recovery for a total loss. The adjustment of the average was a proper object for the commercial tribunal at *Embden*; and having been decided by proper and competent authority, it ought to be conclusive here. The amount is insignificant, but it is important to determine the question how far the adjustment of a general average, by a competent tribunal in a foreign country, is to be binding on the parties here.

Harison, in reply. The law of blockade has been often discussed in this court,[†] and is now too well settled to be disturbed. The doctrine is, that there must be an actual existing blockade, and that the neutral is not to be governed by a mere notification, or a blockade in contemplation of law; but may proceed to the port, and may enter, if no blockade *in fact* exist. The contract of insurance is to be made, and construed, according to this doctrine; the insured undertake to prosecute the voyage described in the policy, until prevented by superior power. If, without such restraint, he should deviate, the insurer would not be liable for a subsequent loss. The insured is not to rest satisfied with any information he may chance to receive on his way, or any rumor which may reach him, as to a blockade; he is bound to pursue his voyage until he has ascertained, beyond all doubt or question, that an actual blockade exists. If the court have been liberal in the construction of the law of nations on this subject, they ought to require of the assured a strict adherence to this rule, before he deviates from his course. In this case, the master of the *Orozimbo* was merely told by cruisers of one of the belligerents, some hundreds of miles from the port of destination, that it was blockaded. He might have gone on, and by the time he arrived off the port, the blockade might either have been raised, or the blockading squadron be blown off by the winds. The notification he received was from an inferior officer, not from the government; from a person who might wish to deceive, and turn him away from his intended port.

*But it is said, the blockade was a fact of public notoriety, and must, therefore, be presumed to have existed; if so, no other evidence would be necessary. But have not this court required evidence on oath of the existence of a blockade? Here a merchant of *New-York* receives a letter from *Hamburgh*, mentioning the blockade, and a vague rumor of the fact ensues; but who is to vouch for the veracity, or accuracy, of the writer of that letter? The least that could be allowed, would be the deposition of a witness as to the letter received. The master was merely warned not to enter *Hamburgh*; he was not prevented from going to *Bremen* or to *Lubeck*, or any other place in the vicinity of the port of destination, in order to ascertain the fact of an existing blockade. Without pretending that he ought to have attempted to pass the blockading squadron, he ought certainly to have proceeded as far, and as near to the port, as he could with safety. If he is to be governed by the information given him by a *British* cruiser in the channel, he might as well have acted from intelligence received at the *Western Isles*, or in the *Atlantic Ocean*.

Can it be admitted that the assured may in such a case, on mere information of a blockade, turn aside and break up the voyage? Is this that *vis major*, that *superior power*, that coercion and restraint, which is said to constitute a peril within the policy?

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† *Vos & Graves*
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2 *Johns. Cases*,
180. 460.
Caines's Cases
in Error, 7
2 *Caines's Rep.*
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† *Williams v.*
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Is this a *restraint of princes*? Though the doctrine about blockade has existed above a century, yet it has never been mentioned as an event included under the *restraint of princes*. But a prohibition to trade is not a loss within the meaning of the policy. It is a mere excuse for a deviation, and the party is to go to the nearest port, and not break up the voyage.

Suppose there was a blockade in fact. This does not justify his going to *Portsmouth* or *London*; he ought to have proceeded directly to *Lubeck* or *Embsen*. If he were allowed to go out of his way to seek advice, every deviation might be excused, on this easy and specious *pretence. The master staid 8 or 10 days in *England*. How far this was necessary, does not appear; if it were one day beyond the necessary time, it amounted to a deviation.

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The consignee was not bound to receive the goods at *Embsen*; but having accepted them there, it is conclusive against the insured. The consignee had the bills of lading, he had full power to dispose of the property, and to act as he thought best for the consignor; he is, emphatically, the agent of the consignor, and his acts are binding on him. If the goods were meant to be abandoned, they ought to have been left with the master, who is the proper agent of all parties.

The claim for general average is still more extraordinary. The plaintiff has paid nothing. There is no evidence that he laid out any money. If any thing was paid, it must have been by the master, who no doubt, reimbursed himself out of the proceeds of the cargo at *Embsen*. But the loss was occasioned by an accident to the ship, and ought to be borne by the owners of the ship. It was not a proper subject of general average; and this court is not to be governed by the decision of the merchants, or courts of foreign countries, without any investigation into the merits.

SPENCER, J. Without repeating the facts, I shall proceed to the consideration of the important question in the cause, whether the cargo has been lost (even if *Hamburgh* was blockaded, and in a state that the vessel could not legally enter) by any of the perils insured against in the policy. The words in the policy, under which the plaintiff claims for a total loss, are, *arrests, restraints and detentions of all kings, &c.* The terms do not, I think, embrace a case like the present; for the master of the *Orozimbo* never attempted to enter the port of *Hamburgh*, nor was there any actual or immediate restraint, to hinder him from doing so.

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I do not profess to consider whether he was, or was not, justified in going to *Embsen*; but I rest on the fact that *there has been no *force*, or *vis major*, to interrupt his voyage. The case of *Pole v. Fitzgerald* (*Willes*, 644.) is of high authority; and it is decided by that case, that the insurance is not on the voyage, but on the ship for the voyage. That principle ap

pears to me to be applicable to this case; for here the ship and cargo remain in safety, but the assured has lost the chance of going to so good a market. The assurer has nothing to do with the speculation, nor state of the market; and nothing has intervened, affecting the ship or cargo, within the terms of the policy. The principle I advance appears to be sanctioned by a decision in 3 Bos. & Pull. 392. (*Hadkinson v. Robinson*.) Though that case be not an authority, yet the reasoning urged by Lord *Alvanley* is so just and conclusive, that I adopt it. The question there was, whether, on an insurance from *Mounts-Bay* to *Naples*, when, subsequently, *British* vessels were excluded from the *Neapolitan* dominions, in consequence of which the cargo insured, from its perishable nature, was obliged to be sold at an intervening port, there was a loss within the policy. The question did not turn on the consideration of the articles being perishable, a circumstance that afforded a just ground for selling them; but on this, whether the shutting the port of *Naples*, so that the vessel could not enter with the goods insured, afforded a ground of action on the policy.

To show that this was the real point, the learned judge says, "Here, without entering into the question how far the cargo was totally lost, the claim made by the assured arises from the ship's not proceeding to that port to which she was destined; and this," he says, "cannot create a total loss within the meaning of the policy, because it does not arise from a peril insured against; such peril must act directly, and not collaterally, upon the thing insured." It is not requisite to pursue this subject further. To what lengths might not the claims of the assured extend, if this was sanctioned? The parties have stipulated mutual things; the underwriters, against the perils of the sea, and any positive actual injury from restraints, arrests, detentions, &c., as matters of fact, and not of imagination.

*The plaintiff's counsel have said, that an embargo is within the policy, and have asked, Why is not a blockade? The answer is obvious; an embargo operates directly on the subject insured, and this does not.

It becomes unnecessary to examine the question as to the want of preliminary proof of the average loss; on the first ground, I am fully of opinion that the defendants are entitled to a new trial, and that the costs should abide the event of the suit.

TOMPKINS, J., was of the same opinion.

THOMPSON, J. The first question presented by this case, is, whether a loss of the voyage, by reason that the port of destination was blockaded, be a peril within the policy; and if so, whether the evidence of *Hamburgh's* being blockaded was sufficient.

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The insurance was on 35 bales of cotton on board the ship *Orozimbo*, at and from *New-York* to *Hamburg*.

This was not an illicit trade, and the assured, according to the general laws of trade, had a right to make his calculations for a sale of the shipment at the port of destination; and, for this purpose, insured the arrival of his goods at that port. Our policies are extremely broad and comprehensive, and would seem to embrace every species of risk to which ships and goods are exposed, from the perils of sea voyages. The underwriter, by his contract, stipulates that the goods shall not be prevented from arriving at their place of destination, by any of the perils insured against. One of those perils is the restraint of princes. In the present case, there was, I think, a total failure and loss of the voyage, by a peril coming within the meaning of the policy, under the term, restraint of princes. By the blockade, the vessel was prevented from going to her port of destination; and if she had proceeded, she would have rendered herself liable to capture and condemnation; for the master to have proceeded to *Hamburg*, when it was in fact blockaded, would have been a violation of his duty. The evidence offered, with respect to *Hamburg's* being blockaded, was, I think, competent, and proper to be *submitted to the jury. So far as the protest of the master went, it was the best possible evidence, and tended directly to show an actual existing blockade; and the general understanding in *New-York* on the subject was certainly a corroborating circumstance. These were submitted to the jury, as the testimony from which they were to determine whether *Hamburg* was in fact blockaded. If a blockade be a risk within the policy, and *Hamburg* was in fact blockaded, the assured was not bound to accept the cargo at any other place; and unless there has been some acts on his part that will amount to an acceptance, he is entitled to recover from the underwriters, for a total loss. The voyage being thus broken up, it was the duty of the master to do what, under the circumstances of the case, was best and most advantageous for the interest of the concerned. His object in going to *Spithead* was to obtain advice from the agent of his owners. And it was by his advice that he went to *Emden*, as being the safest and nearest port to *Hamburg*. The cargo, it is true, was accepted by the consignee at *Emden*; but this I consider not within the scope of their authority, so as to be binding upon the assured. The consignee, in this transaction, must be considered as a mere volunteer, and acting for the benefit of whomsoever it might concern. Perhaps, however, the acceptance ought not to be deemed a voluntary act on his part, for he urged that the goods might be sent to *Lubeck*, which was absolutely refused by the master and owner of the ship. Nothing appears to show that the proceeds of the cargo have come into the hands of the assured, or that he has done any act whatever, ratifying the conduct of the consignees. I,

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therefore, see nothing to preclude him from a recovery as for a total loss. The sum allowed as a general average must be rejected.

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LIVINGSTON, J. The effect of an interruption by blockade, that is, whether it be a peril insured against, is the first point in this cause.

Without having recourse to the sweeping clause of "all other perils, losses, and misfortunes," (which by *Molloy* *and some others, is supposed to "insure against heaven and earth, and to embrace every detriment that can possibly happen to the thing insured,") it appears to fall within the risk of restraints of princes, or of "men of war." It is by the latter that a blockade is formed, and if they prevent the safe arrival of the vessel, or turn her away, how can it be said, that the voyage has not been defeated by a hazard insured against? It is not like a denial of entry, for that happens after arrival, and if accompanied with no restraint or detention, cannot amount to a loss; unless the assurer be considered, in all cases, as warranting a right to sell the cargo, whatever may be the laws of the country to which the property is sent.

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But it is insisted, that the *Orozimbo* had a right to proceed, and should have gone on, until she met with the investing squadron, and had been turned away. That *American* vessels, under the treaty of *London*, have the right of proceeding, until turned away in this manner, I never doubted, and such has been the decision of the Court for the Correction of Errors; but this is not the only inquiry here. Properly to estimate the risk of proceeding, after the endorsement, which was made on her register, we must look at the construction which the High Court of Admiralty of *Great Britain* has put on this part of the treaty.

The *Columbia*, (1 *Rob. Adm. Rep.* 154.) a case well known in this court, was captured without any previous warning, and condemned by Sir *William Scott*, because the blockade of *Amsterdam* was known in *New-York* at the time of her sailing. On ground, then, somewhat resembling this, if not stronger, might the *Orozimbo* have been condemned, if she had gone on, after receiving advice of the blockade from two ships of war, both at no great distance from *Hamburgh*, though not of the blockading squadron. It is sufficient to justify the master's conduct, in cases of this kind, if he have good reason to apprehend that a capture will be the consequence of going on. "A just fear," says *Targa*, (*cap.* 59. 291.) "is a kind of violence, so that abandonment of a vessel from a doubt of not being able to resist, and especially of being made a slave, is a loss within the policy." *And *Casaregis*, (*Disc.* 23. N. 84.) after observing, that in such case, "a captain should not rashly forsake his ship, adds, that it is otherwise if the circumstances are such as may excuse fear, credulity, or even an

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error of the captain." "*Secus si talibus circumstantiis, quæ timorem, credulitatem, aut errorem capitanei excusare possent.*" *Emerigon*, (vol. 1. 509.) also, mentions several instances in which fear of a shipwreck, an enemy, pirates, or the like, which appeared just at the time, though not, in fact, well founded have justified a dereliction of the property. These principles, which appear reasonable, apply to the *Orozimbo*, if we once admit that capture is a peril insured against. If the master, from the notification he received, and the advice given him, were really afraid of condemnation, if he attempted to enter the *Elbe*, (and such were certainly his apprehensions, nor were they without foundation,) he was not bound to proceed. If he had proceeded, and a loss had ensued, he would have been censured, and have furnished a better ground of defence than is now taken. I am presuming the port of destination to be actually blockaded, which sufficiently appears to have been the case with *Hamburg*; for all the parties, on or near the spot, acted on that supposition.

But if it were proper in the master to change his route, he ought, it is said, to have gone to the next nearest port, the voyage not being thereby lost, and the insurance would have protected him thus far. This is not so; the moment a voyage is interrupted by a blockade, a right to abandon exists, and if it be seasonably followed up, every thing that is afterwards done in good faith by the master, must be on account of the underwriters. The assured are not obliged to receive their goods at the next nearest port, or at any other port than the one to which the vessel was bound. They have calculated on a particular market, and if impeded in getting thither, a loss of the voyage has happened, and the property may be cast on the insurers. As to the captain, he acted for the best; nor ought a receipt of the cargo by the consignees to prejudice any one. This was an act, in which the ultimate owner, whoever he might be, had an interest, and it should not be turned to the disadvantage of parties at a distance, who could not give any new orders respecting it. The only point determined in *Hadkinson v. Robinson*, (3 Bos. & Pull. 389.) is, that if a perishable cargo be sold at a loss, at an intermediate port, in consequence of advice received during the voyage, of the port of destination being shut by the government of the country, it is not a total loss within the policy. This decision must have proceeded on the ground, that an insurance does not guaranty a right of entry, or to trade; but if *Naples* had been blockaded, the Court of Common Pleas, without violating any principle it adopted in that case, might have come to a different conclusion.

My opinion is, that the verdict is right, except as to the sum included in it, for the average loss settled at *Hamburg*. As this must already have been paid by the consignee out of the proceeds of the goods, that is, out of a fund belonging to

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the defendants, it ought not to be recovered in this suit ; the plaintiff, therefore, must deduct 57 dollars and 60 cents from his verdict, and enter judgment for the balance.

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KENT, Ch. J. The first question that arises in this case, is as to the sufficiency of the evidence of the actual blockade of *Hamburgh*, in *August* and *September*, 1803. This testimony consisted, 1. In the notice of the fact given to the captain by an officer of one of the *British* ships of war, after the vessel had arrived on soundings near the *English* Channel, with a prohibition to proceed there ; 2. In the like notice and prohibition given him, by an officer of another ship of war off the *Isle of Wight* ; 3. In a letter written to him from *London*, on the 23d of *August* 1803, by *Thomas Wilson*, agent of the owner of the ship, who stated to him the fact, and advised him to go to *Emdden* ; 4. In a letter from *William Boyd*, the owner of the ship, dated at *Hamburgh*, the 3d of *September*, 1803, and addressed to the captain at *Emdden*, in which the fact seems to be necessarily implied ; 5. In the testimony of *a witness at *New-York*, who stated that he received information from *Bremen*, that *Hamburgh* was blockaded in the fall of 1803, and he supposed it was so generally understood and known at *New-York*.

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This evidence was, in the first instance, sufficient for the jury to infer the existence of a blockade at the period in question ; and as the defendants did not attempt to meet or destroy it by counter testimony, the verdict ought not now to be questioned, on account of the insufficiency of that evidence.

The next and more important question is, whether a blockade of the port of destination be a peril within the policy. The only case in the *English* books that appears to have a bearing on the question, is that of *Hadkinson v. Robinson*. (3 *Bos. & Pull.* 389.) The court there considered that the port of destination, being shut, was a peril acting collaterally only, and not directly upon the subject. But that case arose upon the special memorandum in the policy, which requires a peril operating to the total destruction of the article insured. It is not an authority beyond a question arising upon that memorandum ; for with respect to the loss of the voyage, by reason of a blockade of the port of discharge, the peril operates as directly as any other restraint or detention. The interdiction of commerce with the port of destination, is stated by *Emerigon* (vol. 1. 542.) to be a peril of the sea, and if it happens after the risk commences, (as we are to intend it did in the present case, the insurer is responsible for the consequences of it ; but if it existed before the commencement of the voyage, the contract is dissolved. In a question upon which the *English* books and decisions are silent, and when the opinion of *Emerigon* is founded, not upon local ordinances, but upon general principles of insurance, I cannot but consider him as a great authority.

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Nor do I see why a blockade should not be deemed equivalent to any other restraint or detention. It answers the description of a peril as understood in a policy, and which *includes every peril arising from a *vis major*, which could not be resisted, or from a *cas fortuit*, which human prudence could not foresee. It equally interrupts and destroys the voyage. Liberty to go to another port is changing the mercantile adventure, and is nothing less than the compulsory institution of a new voyage; for if the *termini* of the voyage are changed, the identity of the voyage is lost.

I do not consider the act of the consignee in receiving the goods at *Emdden* as binding upon the plaintiff; for as he received them there in consequence of the peril, it was an act of necessity; and he received them as agent for the party in whom the interest should vest, according to the course of events.

It appears, then, to me, that the blockade, in fact, being established, the captain was forced out of his voyage by the peril that his conduct in going to *England*, and from thence to *Emdden*, arose from necessity, and was guided by the best advice, and the best discretion, that the circumstances of his case afforded; and the abandonment having been duly made, the plaintiff is entitled to recover as for a total loss.

As to the further sum, found by the verdict, for the gross average, it cannot be admitted. We have allowed, (1 *Caines's Rep.* 284. 450.) after a recovery for a total loss, a further sum for expenditures in laboring to save the property, under the special agreement in the policy, but we have gone no further. That sum must be deducted from the verdict.

Judgment for the plaintiff.(a)

(a) See *Symonds v. The Union Insurance Company*, (4 *Dallas*, 418 in the Circuit Court of the U. S.) *Lalibock v. Rowcroft*, (5 *Esp. N. P. Rep.* 50.) *Barker v. Blake*, (9 *East's Rep.* 283.) *Parkin v. Turner*, (*Park*, 6 edit. 618.)

[* 267] *JACKSON, *ex dem.* C. R. COLDEN and others, *against*
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In a lease it was covenanted, "that in case the lessees should suffer or permit more than one family to every 100 acres, to reside on, use, or occupy any part of the premises, the lease should be void," &c. It was held, that

THIS was an action of ejectment for lands in *Pittstown*, in the county of *Rensselaer*. The cause was tried at the circuit in *Rensselaer* county, on the 30th of *May*, 1804, before Mr. Justice *Spencer*. The plaintiff produced, and proved, a lease of 248 acres of land, the premises in question, dated the 15th of *March*, 1794, for the term of 21 years, executed by *Alexander Colden*, deceased, of the one part, and *Ebenezer Wilson*, as lessee, of the other part. The lease contained the following condition: "*That in case the lessee, his executors or administra-*

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tors should suffer or permit more than one family or tenant, to every 100 acres, to reside on, use, or occupy any part of the said premises, that then, and in such case, the said lease should be void, and the estate thereby created cease and determine." It was stipulated that the lessor might reserve 70 acres of the premises for a wood lot. An endorsement was made on the same day with the date of the lease, and executed by the parties, by which the seventy acres were accordingly reserved, which reduced the quantity to 178 acres. The present action was brought for a breach of the above condition, by which the lease was alleged to have become forfeited. *Wilson*, the lessee, occupied the premises; then *Joseph King*; then *Reuben Peckham* and *Seth Peckham*; then *Hughes* and *Butler*; lastly, *John Wilcox* and the present defendant, who now live thereon. Four years ago, *Hughes* and *Butler* occupied a farm, parcel of the land in question. One *Halt*, who did not live on the premises, sowed five acres, and by an agreement with the *Peckhams*, he was to have the crops for clearing and enclosing, three of the five acres being new land. *Hughes* resided on the premises from *April* to *February*, and *Butler* some time longer. They took the farm for a year, and planted it together. They entered under the *Peckhams*, who reaped a crop, which *had been sowed the preceding season. They lived in one house, sowed their wheat separately, and divided their oats, as they drew in the crop. *Hughes* was to have half of *R. Peckham's* part, and *Butler* the half of *S. Peckham's* part for one year. The *Peckhams* retained the residue. *Hughes* was to have a third of the crop of wheat. The *Peckhams* were to provide the seed and two thirds of the team. *King* paid rent to the agent of the *Coldens* for the premises in question; and the *Peckhams* paid rent after *King*. *Simeon Brownell* purchased the lease and all the right and interest of the *Peckhams*. The defendant and *Wilcox* have been in possession of the premises under *S. Brownell*; and have occupied separate lots, and have each of them a family. The lessors of the plaintiff are the heirs at law of *Cadwallader R. Colden*, deceased.

The defendant moved for a nonsuit on the following grounds: 1. That the two persons made but one tenant; 2. The agreement entered into did not make them tenants, within the terms of the lease; 3. There was no privity between them and the first lessee; 4. The lease authorized one tenant besides the first lessee. The judge then called on the plaintiff for further proof, which not being produced, he was nonsuited; but leave was given to move the court to set the nonsuit aside.

Van Vechten, for the plaintiff, in support of the motion to set aside the nonsuit, and for a new trial, contended, that the intent of the lessor, in introducing this condition, was to prevent the land from being burdened with tenants, and the soil impoverished by exhausting crops. In this view the condition is to be construed, that there was to be but one tenant to a

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letting parts of the premises to persons for a year to cultivate for shares made such persons tenants within the meaning of the covenant; and there being more than one such tenant to each 100 acres, the lease was thereby void. Persons so occupying the land for one year, on shares of the crops, have an interest in the land, and are not mere laborers or ser-

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vants to the lessee (a)

(a) Overseers of
Fort Ann v. Overseers of Kingsbury, 14 Johns 365.

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hundred acres. If there were less than two hundred acres, there could be but one tenant. Without deducting the 70 acres reserved by the lessor for wood, still there were three persons occupying and using the land at the same time, though the quantity was less than three hundred acres.

* 269] *Woodworth*, Attorney General, contra. The rent reserved *on this lease is very high, while the tenant is tied down by many severe restrictions. In the attempt to avoid the lease for a breach of this condition, the court will require the plaintiff to bring his case clearly and strictly within the terms of the contract. Courts lean strongly against forfeitures; they will be astute to discover reasons in support of leases, rather than to avoid them. The 70 acres were a mere reservation of the wood, and to prevent its being cut down during the term. The tenant paid rent for 248 acres, and all the covenants extended to that quantity. Suppose there had been 299 acres, might the lessee not have farmed out 100 acres to B. and 100 acres to C. and have continued to occupy the residue? It would be a very rigid construction, to say that such an occupation by three persons was a breach of the condition, so as to produce a forfeiture of the lease.

There is no privity between *Wilson*, the original lessee, and the occupiers of the land. If no privity is shown, the plaintiff cannot recover on the ground of a forfeiture. The word *tenant*, in the lease, must be construed according to its legal signification. If A., the lessee, permit B. to go on the land and cultivate it *on shares*, it is not a tenancy in B. It is a particular mode of hiring, or *contract* for labor. The persons who thus occupied by permission, could not have maintained an action of trespass for a violation of such possession. Such occupiers do not acquire the rights of tenants.† The lease speaks of tenants; not mere occupiers, or servants of the lessee. If this be correct, then there have been but two real tenants on the premises.

†*Cro. Elis.* 143.
Hare and others
v. Celey, 6 *Bac*
Ab. 568. by
Gwill. *Tres.*
pass, C. 3.

* 270] *Van Vechten*, in reply. If the condition of a lease be a hard one for a lessee, and for the sole interest of the lessor, a more strict construction ought to prevail against a forfeiture. But where the object of the condition is for the benefit of agriculture, and to prevent an exhaustion of the fertility of the land, by overburdening it with tenants, there is no reason for leaning in favor of the lessee. *The supposition of 299 acres does not remove the difficulty as to the number of tenants, any more than a supposition of 201 acres, if the terms of the condition are to be adhered to. There were, in fact, four persons on the farm, and the hiring was for a year. The case cited from *Croke* is not analogous. There the tenant in possession let the land to another to sow it upon shares of the crop; and it was a mere hiring of service.

The words of the covenant are, that the lessee shall not

permit more than one tenant to each hundred acres. He was bound to know that these persons were in possession; and if he did know, the court will intend his permission, which is an answer to any objection as to want of privity between them.

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THOMPSON, J. I think the number of tenants is restricted to two; no number beyond that will comport with the terms of the lease. The clear import of the restriction is, that there shall not be more tenants than so that each one may have one hundred acres of land; and if so, it appears to me to result, as a mathematical certainty, that 248 acres will admit of only two tenants. The given number of acres being divided by one hundred, the quotient will designate the number of tenants. It is true, that courts have always held a strict hand over conditions for defeating leases. But when parties have made express stipulations, which, in my judgment, will admit of but one interpretation, not to give effect to them would be making a new contract for parties, instead of construing that they have made for themselves.

How many families or tenants, then, within the meaning of the lease, have been permitted, at the same time, to use and occupy the premises? I think, clearly, more than two. *David Hughes* and *William Butler* resided upon the premises, with their separate families, and improved separate parts of the land. They held under *Reuben* and *Seth Peckham*, who were the assignees of the lessee, and the agreement between them was, that *Hughes* was *to have half of *Reuben Peckham's* part, and *Butler* half of *Seth Peckham's* part, for one year, the *Peckhams* retaining the residue; by this means the premises had at least four separate and distinct occupants, independent of *Hall*, who was permitted, at the same time, to sow a distinct part of the land with wheat. The compensation to be made to the *Peckhams* for the use of the land, being stipulated to be a portion of the produce raised, must have the same effect as if the rent had been reserved in money. (*Woodfall*, 122.) The provision in the lease was, doubtless, to guard against having too great a proportion of the land ploughed and sowed the same season, and to prevent the waste of timber for fire-wood; and in this point of view, the restriction must be considered for the benefit of husbandry. The manner in which the premises have been occupied and used, is, I think, clearly against the terms of restriction contained in the lease, as well as against what must have been the meaning and intention of the parties. My opinion, therefore, is, that the nonsuit should be set aside, and a new trial granted.

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LIVINGSTON, J. There is nothing unreasonable in this condition, and if there were, it is not for us to disregard it on that account, the lessee having chosen to submit to it. We have only to inquire, whether it has been broken? The quantity of land leased, about which there appeared to be some dispute,

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was admitted in the argument to be 248 acres; for, though the landlord had a right to cut wood on seventy acres, they were to be considered as among those demised, subject only to his privilege. There existed a right, then, in the lessee and his assigns, to have two tenants or families on, or using the premises, at any one time, if not three, but no more. The *graven*, or breach relied on, is, that the two *Peckhams*, *Hall* *Hughes* and *Butler*, making five in all, used the land at the same time.

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Hughes and *Butler* took under the *Peckhams*, who were then owners of the lease. The first had half of *Reuben Peckham's*, and the other the same proportion of *Seth Peckham's* part, the *Peckhams* reserving the residue to themselves, and *which, of course, they must have used as their own. Without taking any notice of *Hall*, the land, during this year, was used by at least four tenants. It is of no importance on what terms *Hughes* and *Butler* took the land, whether on payment of money, or on a partition of its produce between them and the *Peckhams*, which is not an uncommon way of letting farms in the country. The only question is, whether they were tenants, or barely servants, under the *Peckhams*. Each had every character of a tenant, and not of a mere laborer for the owner of the soil. They took under a contract to possess for a year; they occupied the same house; they had an interest or estate in the land; they paid rent in grain; they might bring their own cattle on, and reap what they pleased from it, for their exclusive benefit, except grain, which was to be divided; and, what is very important, they had a right (it not appearing they were restrained by special agreement) to the use of wood for burning, repairing, &c., and if they continued in possession, by mutual consent, after the end of the first year, a tacit renovation of the original contract would have been implied, and they could not have been dispossessed, without half a year's notice to quit. (1 Term Rep. 159. *Flower v. Darby*.) Very different is the condition of a person who is hired for a few days, to plough or reap a particular field, on having part of the produce. He enjoys none of these privileges, and can do the land no injury, except in the mere working of it, to which the original lessee and his assigns must be entitled to any extent. They might hire a hundred laborers, but could not divide the farm into as many shares, and grant to as many persons a right to pasture cattle, to cut wood, &c. for a whole year, as was granted to *Hughes* and *Butler*, without a palpable violation of the condition, or rendering it a nullity.

My opinion, then, is, that at the time we are speaking of, there were four tenants in the use and enjoyment of those premises, the two *Peckhams*, with *Hughes* and *Butler*; that the plaintiff was entitled, on this evidence, to a verdict; and that

the nonsuit, of course, must be set aside, and a new trial had, with costs to abide the event.

KENT, Ch. J., SPENCER, J., and TOMPKINS, J., concurred.

Nonsuit set aside, and a new trial granted. (α)

(α) After a new trial, a judgment was given for the plaintiff, on the same facts as above stated, in *August* term, 1809.

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AGAN.

*JACKSON, *ex dem.* COLDEN and others, against AGAN. [* 273]

THE facts in this case, which was tried at the same time with the preceding one, are nearly the same. Both leases contained the same covenant. This lease was for 135 acres, and there was a reservation of 40 acres for wood. *Benjamin Agan*, the son of the lessee, occupied a part of the premises under his father, who improved the remainder. Part of the time they worked separately, and took their respective crops. The son lived in a house by himself, and kept a separate family and stock. The lessee died; and *Benjamin Agan* having left the premises, the present defendant took possession. There was no agreement between the lessee and his son *Benjamin*; he went on, however, by his permission; but did not occupy more than half the land, any one year. One *Filkin* had also used and occupied the premises with the defendant about two years, and received one third of the crops for his labor.

A lessee covenanted not to permit more than one tenant to each 100 acres, to reside on, or occupy, the premises. The quantity of land demised was 135 acres. In an action for a breach of the covenant, it was held, that the allowing of one tenant, besides the lessee, to occupy the premises, was not a breach of the covenant.

Van Vechten, for the plaintiff.

Woodworth, Attorney General, for the defendant.

THOMPSON, J. The questions involved in this case are substantially the same, as in the preceding. The lease here was only for 135 acres of land, which, according to my construction of the lease, will admit of only one tenant or occupant. Instead of which it appears, that the lessee, during his lifetime, occupied and improved a part of the farm, and, at the same time, his son *Benjamin* lived upon and improved a separate and distinct part; and that the present defendant has, since the death of the original lessee, permitted one *Filkin* to occupy a part of the premises, contrary to the condition of the lease. I am of opinion, therefore, that a new trial ought also to be granted in this case.

KENT, Ch. J. Admitting that the lessee's son *Benjamin* was a tenant within the meaning of the condition, the question will be, whether the lessee might not take one tenant or family on to the premises, considering there were 35 acres granted beyond the 100. Unless we admit the construction, the covenant is in a great degree senseless. Why say that

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there shall not be but one tenant to 100 acres, if the meaning was that the lessee or his assignee could alone occupy the premises? The language of the covenant evidently points to more than one occupant, for the lessee was not to permit more than one family to 100 acres. I am of opinion, accordingly, that the covenant in this case will admit of the construction of two tenants residing on, or occupying the 135 acres, and that the motion to set aside the nonsuit ought to be denied.

TOMPKINS, J., SPENCER, J., and LIVINGSTON, J., concurred

Rule refused

DEFREEZE against TRUMPER.

In every sale of a personal chattel, there is an implied warranty, in respect to the title of the vendor. (a) *Aliter*, as to the quality or soundness of the thing sold. (b)

(a) *Reov v. Barber*, 3 Cow. Rep. 272.

(b) *Sweet v. Colgate*, 20 Johns. 196. *Oneida Men. Society v. Lawrence*, 4 Cow. Rep. 443.

FROM the return to the *certiorari* in this cause, it appeared, that an action of trespass on the case had been brought by the present defendant, against the present plaintiff, before the justice, to recover damages for the sale of a horse, the title to which was, afterwards, proved to be in a third person, and not in the vendor. The horse had been sold by *Defreeze*, as *executrix in her own wrong*, to *Trumper*, and the administrators of the estate of the intestate, afterwards, recovered the value of the horse of the vendee. Before the trial of that cause, *Trumper* gave notice to *Defreeze* to come forward and defend the suit. The plaintiff below recovered judgment against the defendant, for damages and costs.

Woods, for the plaintiff in error.

P. W. Radcliff, for defendant.

Several exceptions were made, and the case was submitted without argument.

The principal objection, and the only one considered in the judgment of the court, was, that the declaration did not sufficiently aver, nor the evidence establish, any *warranty* or *fraud* in the sale.

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**Per Curiam*. We are of opinion, that an express warranty was not requisite; for it is a general rule, that the law will imply a warranty of title upon the sale of a chattel. This rule is laid down in the *Commentaries of Sir William Blackstone*, who says, (vol. 2. 451.) "that by the civil law, an implied warranty was annexed to every sale, in respect to the title of the vendor; and so too in our law, a purchaser of goods and chat-

tels may have a satisfaction from the seller, if he sells them as his own, and the title prove deficient, without any express warranty for that purpose. But with regard to the goodness of the wares so purchased, the vendor is not bound to answer, unless he expressly warrants them to be sound and good, or unless he knew them to be otherwise, and hath used any art to disguise them, or unless they turn out to be different from what he represented them to the buyer." The present decision does not, therefore, interfere with that of *Seixas v. Woods*, (2 *Caines*, 48.) or the question in that case arose upon the quality and not upon the title of the chattel sold, and the two cases are discriminated by the distinction taken by *Blackstone*.

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VAN RENS
SELAER'S
EX'ORS.
v.
PLATNER'S
ADM'RS.

Judgment affirmed.(a)

(a) See *supra*, 96. and 129. and *Dorlan v. Sammis*, (2 *Johns. Rep.* 179. note.) *Holden v. Dakin*, (4 *Johns. Rep.* 421.) *Davis v. Meeker*, (5 *Johns. Rep.* 354.) See also *Fisher v. Samuda*. (1 *Cummb. N. P. Rep.* 190.)

ANONYMOUS.

THE court said, that on an appeal from the decision of a judge, refusing a certificate to stay proceedings, for probable cause, after verdict, the party appealing may deliver to the court the points and authorities on which he relies, together with the case.

Practice on
appeals to the
court for a cer-
tificate to stay
proceedings.

*The EXECUTORS of VAN RENSSELAER *against* The ADMINISTRATORS of PLATNER. [* 276]

THIS was an action of *covenant for rent arrear, payable in wheat*. The question submitted to the court was, whether interest was recoverable on the arrears of rent.

Interest is
not recoverable
for arrears of
rent, payable in
wheat.

Henry, for plaintiff.

Williams, contra.

Per Curiam. We are of opinion, that, as a general rule, interest is not recoverable in such a case; and nothing appears, in this instance, to hinder the application of that rule.(a)

(a) See *Clark v. Barlow*, (4 *Johns. Rep.* 183.) Interest is recoverable on arrears of rent payable in money.

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ELIJAH OWENS, jun. *against* MOREHOUSE.

If the defendant neglect to appear, he cannot, afterwards, in error on *certiorari*, take advantage of a variance between the declaration and process. Want of an averment in a declaration, will, after judgment, be intended to have been supplied by proof.

BY the return to the *certiorari* in this cause, it appeared, that, on the 23d of *April*, 1804, the justice issued a summons in behalf of *Morehouse*, in a plea of trespass on the case, against the present plaintiff, *Elijah Owens*, sen., and *Daniel Owens*, to appear on the 4th of *May* following; and that the summons was returned as served on the 28th of *April*, by reading it to each of them. On the return day, *Owens*, sen. appeared, and *Morehouse* declared against *Owens*, jun. in *assumpsit* for work and labor, and *Owens*, sen. pleaded thereto the general issue, and that he and *Daniel Owens* were not in partnership with *Owens*, jun. After hearing the proofs and allegations of the parties present, the justice gave judgment against *Owens*, jun., and held, that the other two defendants were not in partnership with him.

This case was submitted *without argument*.

Per Curiam. The only objections worth mentioning to this return are, that the process was joint against three, and the declaration against the present plaintiff alone, and that the declaration wants an averment that the work was actually performed.

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The answer to these is, that the defendant, by not appearing, *cannot now make any objection to the variance between the process and the declaration, and that the averment required would, after judgment, be intended to have been supplied by the proof.

Judgment affirmed

JACKSON, *ex dem.* ROBINSON, *against* JOSEPH MUNSON

SAME *against* WATERMAN.

SAME *against* WILLIAM MUNSON.

After judgment for the plaintiff in ejectment, against a tenant, claiming as a purchaser from the commissioners for the sales of forfeited estates, the court ordered the writ of possession to

THESE causes were argued at a former term, and judgments given in favor of the plaintiff, with liberty for the attorney general to make application to the court, for compensation for the improvements made by the defendants. It appeared, that the premises were a part of a royal grant to Sir *William Johnson*, who died seised thereof, after devising the same to his natural daughter, *Margaret Johnson*, since intermarried with *George Farley*, under whom the lessors of the plaintiff claim

ed. The premises were sold by the commissioners of forfeiture, under the act for the forfeiture of all the estates of persons who adhered to the enemies of this state, passed the 22d October, 1779,† to the defendants, or to those under whom they derived title, prior to the conveyance from the devisee of Sir William Johnson. The record of the conviction of Margaret Johnson was of the term of January, 1783, and judgment of attainder was signed the 15th July, 1783.

Woodworth, Attorney General, at the last term, moved that the writ of *habere facias possessionem* should be stayed until the defendants should be paid for their improvements, agreeably to the act of the legislature of this state, passed the 12th May, 1784.‡ He said the question was of great importance, as it concerned many persons who held lands under the commissioners of forfeitures. It would probably be objected, that the act was unconstitutional, as being against the provisions of the treaty; but this court had decided that the act was constitutional.(a)

*Van Ness, contra. The plaintiffs in these causes recovered judgment, on the ground that the conviction of Margaret Johnson was illegal. If the commissioners have illegally attainted the person, under the forfeiture of whose estate the defendants claim, they have no right whatever. By the fifth article of the preliminary treaty of peace between Great Britain and the United States, of the 30th November, 1782, it is agreed, that no future confiscations should be made, nor any prosecutions commenced against any persons, on account of the part they had taken in the war. The attainder of Miss Johnson took place after the execution of this treaty, which, by the constitution, is declared to be the supreme law of the land, and paramount to all legislative acts. The act of 1784,(b) which requires the plaintiff to make compensation for the improvements, so far impairs this right, and is an impediment which contravenes that article of the treaty. The tenant, if he has any just claim for a compensation, must look to those under whom he holds, and who have undertaken to guaranty his title.

Woodworth, in reply. The legality of the confiscation is not the question; the only inquiry is, whether the defendant is a purchaser under the commissioners, and as such, within the

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be stayed until the plaintiff should make compensation to the tenant for his improvements, pursuant to the act of the legislature, passed the 12th May, 1784.

† Greenleaf's
edit. of the Laws
of New-York,
vol. 1. p. 26.

‡ Greenleaf's
edit. of the laws
vol. 1. p. 127.

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(a) Jackson, ex dem. St. Croix, v. Sands, (2 Johns. Cas. 267.) Sleght v. Kane, (2 Johns. Cas. 237.)

(b) The 1st section declares, that the deed or conveyance of the commissioners shall operate as a warranty from the state to the purchaser, and that in case of eviction, he shall have his remedy, in a manner to be provided by future acts; "and if judgment, in a due course of law, shall be obtained for any lands, &c. which shall be sold by virtue of this act, against any person or persons having or deriving title thereto, from or under the people of this state, or the said commissioners, the person so obtaining judgment shall not have any writ of possession, nor obtain any possession of such lands, &c., until they shall have paid, &c. the value of all improvements, to be ascertained by two appraisers," &c.

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provision of the act. It can hardly be denied that the legislature might, notwithstanding the treaty, pass an act, declaring that the rightful owner should not be restored to his possession, without making a reasonable compensation for the improvements made by the former occupant or owner. The plaintiff recovered judgment in this cause, on the ground, that the judgment of attainder was rendered, and the record signed, subsequent to the execution of the treaty. To require this compensation cannot be deemed an impediment, since the legislature, though they cannot take away the right of the party, may modify the *remedy*, so as to compel him to do justice. The last clause of the 5th article of the treaty does not apply to attainders, or attainted persons; it merely declares, that "all persons who have any interest in confiscated lands, either by debts, marriage settlements, or otherwise, shall meet with no lawful impediment in the prosecution of their just rights." All the preceding part of the article, which refers to attainted persons, is advisory, or recommendatory only, and is not binding on the legislature, or the courts of judicature. It is merely agreed, that Congress shall earnestly *recommend* to the several states, to restore the confiscated estates, &c. It establishes no right. The last clause, it is true, is positive, definite and obligatory, but it relates to a different description of claimants, and is not applicable to the case of *Margaret Johnson*, unless the word *otherwise* may be said to comprehend it. But that expression is not to be extended to the general description of persons or claims, in the part of the sentence which immediately precedes. The 6th article of the treaty, which provides that there shall be no future confiscations, does not apply to the case before the court. The act of 1784 creates no confiscation; it merely modifies the *remedy* of the plaintiff, so as to oblige him to make a reasonable compensation to the tenant for the improvements he has made on the lands.

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THOMPSON, J. Judgment having been recovered against the defendant in this case, application is now made under the statute of this state, relative to the sale of confiscated estates, passed the 12th of May, 1784, for stay of execution, until compensation be made for the improvements, according to the provisions of the first section of the act. The only question presented for decision is, whether the act can be considered as applying to this case. The premises in question were sold by the commissioners of forfeitures, as part of the estate of *Margaret Johnson*, who had been convicted under the afore-said act, for adhering to the enemy. The conviction, however, was not until January, 1783, and subsequent to the provisional articles of peace between the *United States* and *Great Britain*, which were signed on the 30th of November, 1782. Unless the provisions in this treaty take the case out of the statute,

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there can be no doubt that the defendant must be compensated for his improvements before he can be turned out of possession. I am inclined, however, to think, that the operation of the treaty will be to prevent the application of the statute to this case. The 6th article declares, "that there shall be no future confiscations made, nor any prosecutions commenced, against any person or persons, for or by reason of the part which he or they may have taken in the present war, and that no person shall, on *that account*, suffer any future loss or damage." All confiscations, then, after the signing of the treaty, must be considered null and void. The proceedings against *Margaret Johnson* were commenced prior to, but no judgment or conviction obtained until after the signing of the treaty. What then is to be considered the date of the confiscation? The act of attainder, passed the 22d of *October*, 1779, is explicit on that subject. It declares, that the forfeitures shall be deemed to have accrued at the time of conviction. No right or title to the land could be vested in the people of this state, until conviction, and if such conviction was absolutely void, the people never acquired any title, nor in any manner whatever, succeeded to the rights of *Margaret Johnson*. We must consider the lessors of the plaintiff as standing in the place of *Margaret Johnson*, and entitled to all the benefits of the treaty of which she could have availed herself. The crime for which she stood indicted, and upon which the forfeiture was to accrue, was for *adhering to the enemies of this state*. The article of the treaty above referred to declares, that no *person shall, on that account, suffer any future loss or damage, either in person or property. Had *Margaret Johnson* been the plaintiff in this cause, and it should be imposed upon her to pay for the improvements, before she could have the effect of the judgment, it certainly would be a loss or damage, on account of the part she had taken in the war, or for adhering to the enemy; because it would be a compensation required only in cases where there is a recovery of land sold as forfeited, on account of the very crime charged against her, and contrary to the general rule of law, on a recovery in an action of ejectment.

My opinion, therefore, is, that the treaty prevents the application of the statute to the present case, and that the plaintiff is entitled to the effect of his judgment, without making any compensation for the improvements.

KENT, Ch. J., declared himself to be of the same opinion.

LIVINGSTON, J. In *August* term last, we gave judgment for the plaintiff, because the conviction of *Margaret Johnson*, under whom he claims, took place after signing the preliminaries of peace between *Great Britain* and the *United States*, and was, therefore, void.

An application is now made to stay a writ of possession, until the defendant be paid for his improvements, on a valua-

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tion to be made, agreeably to the first section of the act for the speedy sale of confiscated estates, passed 12th May, 1784

This motion is opposed, on the ground that the attainder having been determined to be illegal, it would be contrary to the treaty of peace, to throw any obstacle in the way of recovering possession of the premises. Were the treaty susceptible of this construction, or were it even a doubtful case, I should not interfere, but let a *habere facias possessionem* go, as in ordinary cases. But there is no article to which it is necessary to give this interpretation. The fifth and sixth articles only have been referred to. The fifth article embraces two descriptions of persons; those whose estates had been confiscated, and such as had demands against the property. In favor of the first, *Congress were to recommend certain measures to the legislatures of the respective states; and as to the other, it is expressly agreed, that they shall meet with no lawful impediment in the prosecution of their just rights. The case of the lessors of the plaintiff is evidently not embraced by this article. If *Margaret Johnson's* estate had been confiscated, she would have been included in the recommendatory part of the article. It is equally clear, that claiming the land itself, and not merely a demand against it, either by debt, marriage settlement, or otherwise, the other member of the article does not apply to her.

The sixth article stipulates, "That there shall be no future confiscation, by reason of the part which any one may have taken in the war; and that no one, on that account, shall suffer any future loss or damage in his person or property, and that those who may be in confinement on such charges, at the time of the ratification of the treaty in *America*, shall be immediately set at liberty, and the prosecutions so commenced be discontinued."

The only and obvious meaning of this provision is, that no more property shall be confiscated, and that all prosecutions for political offences shall cease. There is nothing then in the treaty, to deprive the legislature of the right of providing, by a general act, for the indemnification of those who had, under the sanction of a title derived from the public, made valuable improvements on lands. Such a regulation was equitable, and necessary to prevent great injustice. It could not be right, that those who had put expensive buildings on real estates, under what they conceived a *bona fide* title, should lose them on eviction, or that they should be reimbursed by the state for them. It was more natural, and more consonant to equity, when the mistake was discovered, that the owner of the soil to whom the improvements would belong, and to whom they might be worth many thousand pounds, should make a reasonable compensation for them. This was not exposing him to a further loss of property, on account of the part he had taken in the war, but only asking him to pay for what, until such

satisfaction was made, he *could not in conscience claim as his own, that is, for buildings erected, or valuable improvements made by others. This was giving him a *quid pro quo*. My opinion, therefore, is, that the writ of possession be stayed until the value of the improvements made by the defendant be ascertained, and he be satisfied for the same.

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TOMPKINS, J., was of the same opinion.

SPENCER, J. Having been formerly concerned for the defendant, as attorney general, in this cause, I did not intend to have given any opinion; but the other judges being equally divided, and in compliance with their wishes, I am induced to say, that I concur in the opinion just delivered by Mr. Justice LIVINGSTON.

Rule granted.

DOUGLAS against HOAG.

FROM the return made to the *certiorari* in this cause, it appeared that *Douglas*, the defendant below, was sued by *Hoag*, in an action of *assumpsit*; and pleaded to the plaintiff's declaration, that, previous to the commencement of that action, he had brought an action against *Hoag*, before another justice of the peace, in a plea of trespass on the case, and that the *summons* had been duly served on *Hoag*, prior to the commencement of this action. On a *demurrer* to the plea, the same was overruled by the justice, and a judgment rendered against *Douglas*. A motion was made to reverse the judgment; and the case was submitted to the decision of the court, without any argument.

In an action before a justice, it is a good plea in bar, that the defendant had previously commenced an action against the plaintiff before another justice in which the plaintiff ought to have set off his demand. (a)

(a) See *Boycer v. Morgan*, 3 Caines, 133. Townsend v. Chase, 1 Cow Rep. 115.

SPENCER, J. The error assigned in this case, is, that the justice improperly overruled the plea of the pendency of another suit before another justice. The suit thus alleged to be pending, had been so far instituted, that a summons had been served. To any other court than that of a justice, it would be a frivolous objection that one party had commenced a suit against the other, because, though the defendant, in the first suit, may set off his demand, yet he cannot be obliged to do so, nor does he forfeit his debt if he omit it. It is supposed, that the 9th section of the 25 dollar *act gives a right to the party who has first sued out process, to coerce the defendant, to submit to the tribunal which has been first resorted to, and there to set off his demand.

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The section referred to undoubtedly requires the defendant to set off his demand at the trial; and if he neglect or refuse so to do, he is precluded from any action to recover the same, unless it exceeds 25 dollars. But in this case, there had been

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no neglect or refusal to plead and set off. It is true, the plaintiff in error had acquired a priority; but this, by no part of the act, precluded the defendant in error from taking out a process, returnable at a day prior to that on which the other was returnable. I admit that such practice may be attended with vexation, but to apply a corrective is solely within the power of the legislature. I cannot say that an act which precludes a party's demand, if not brought forward at the trial, shall be construed to mean to preclude his suing for that demand, when there has been no trial, nor any neglect or refusal to offset it. The judgment below ought to be affirmed.

LIVINGSTON, J. I concur in the opinion just delivered. There is nothing in the act to deprive the defendant in error of a right, which he would have in every other court, to bring a cross suit. Nor can I perceive why it should be so. It would give the debtor a choice of the tribunal; for if he apprehended a suit on the part of his creditor, he might take out process against him, before such justice as he deemed most friendly, and compel him to litigate there; at any rate, if it should be otherwise, it will be easy for the legislature to say so.

THOMPSON, J. The determination of the question arising in this case will depend upon the construction to be given to the 9th section of the act for the more speedy recovery of debts to the value of 25 dollars, which declares, "that if the defendant, in any action to be brought by virtue of this act, hath any account or demand against the plaintiff, he may plead and set off the same against the debt or demand of the plaintiff; and if he shall neglect or refuse so to do, he shall, for ever thereafter, be *precluded from having any action to recover the same." It has been settled in this court, in the case of *Carpenter and Butterfield*,† that, with respect to suits prosecuted here, the issuing of the writ, as to every material purpose, shall be deemed the commencement of the suit; and by analogy, the issuing of the summons or warrant in a justice's court, must be the commencement of the suit there. The obligation imposed on a defendant to set off his demand, must, I think, attach on the commencement of the suit against him, and oblige him to set off, in that action, any account or demand existing at that time. The words of the statute will warrant this construction: they are, "If the defendant, in any action to be brought, hath any account or demand," &c. The question naturally arises, *Hath when?* The answer is, *Hath* at the time the suit is brought or commenced against him. If the defendant's account or demand arose after the commencement of the suit against him, he would not be obliged to, neither could he, set it off, if objected to, according to the decision in the case of *Carpenter and Butterfield*. If the defendant's obligation to set off his account or demand attached on the commencement of the suit against him, he certainly would have no right, after-

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† Referred to in
Guinea, 71.

wards, to commence a suit, and thereby make himself plaintiff, instead of defendant. The construction of the statute which I have adopted, appears to me not only necessarily to result from the phraseology used, but to be the most conducive to the ends of justice, and best calculated to prevent litigation. To permit a defendant, against whom a suit is brought, immediately to commence a cross action, and endeavor to have his cause brought to trial first, and to compel the plaintiff, in the first action, to set off his demand in the second, would not only be throwing on him the costs of his own suit, which he had a legal right to commence, but would be opening a door to that kind of strife and vexatious practice, which ought not to be countenanced. My opinion, therefore, is, that the plea interposed by the defendant in the court below, ought to have been received by the *justice in bar of the plaintiff's action, and that the judgment below must be reversed.

KENT, Ch. J., and TOMPKINS, J., declared themselves of the same opinion.

Judgment reversed. (a)

(a) See *Serjeant v. Holmes*, 3 Johns. Rep. 423.

HOTCHKISS against LOTHROP.

THIS was an action for a *libel*. The cause was tried at the *Oneida* circuit, on the 14th of June, 1805, before Mr. Chief Justice Kent. The publication of the *libel* by the defendant, as editor of the gazette in which it appeared, was proved. The paper was addressed to the electors of the county of *Oneida*, in defence of the character of *Jesse Curtis*, Esquire, one of the candidates, as a member of the assembly, against certain charges which had appeared in the *Columbian Gazette*, printed at *Utica*, and in this defence the author animadverted on the plaintiff, as the supposed author of the other piece. The plaintiff, in aggravation of damages, offered to prove that the defendant was indemnified for the publication of the *libel*; but the judge overruled the evidence, as the defendant was to be considered as the author. The defendant then offered, in justification, under notice of special matter annexed to the plea of not guilty, to prove that the plaintiff had, in a certain publication made by him, previously libelled *Jesse Curtis*; but this was objected to, and overruled by the judge, as matter of justification. The evidence was then offered as matter of excuse, and it was admitted by the judge, to explain the subject, occasion, and intent of the publication complained of by the plaintiff, it being unnecessary, in that view, that it should be set forth in the notice which accompanied the plea. The paper,

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In an action for a *libel*, the defendant may give in evidence a former publication by the plaintiff, to which the *libel* was an answer, to explain the subject matter, occasion and intent of the defendant's publication, and to mitigate of damages. But such prior publication by the plaintiff, though a *libel* on the defendant, does not amount to a justification of the defendant, nor will it be received as evidence as a justification. (a)

(a) *Boardley v. Maynard*, 4 Wend. Rep. 336

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signed by the plaintiff, was accordingly read to the jury. The judge charged the jury, that, as the plaintiff had produced no evidence to prove the truth of the facts he had alleged against *Curtis*, the publication was to be deemed untrue, and that *the defendant was, therefore, warranted in making the publication complained of by the plaintiff, provided he confined himself, in his strictures, to the previous publication of the plaintiff, which appeared to him to be the case.

The jury found a verdict for the defendant.

Simonds, for the plaintiff, contended, 1. That the evidence offered to show that the defendant was indemnified by the author, ought to have been received, as it was a circumstance proper for the jury to take into consideration in estimating the damages; 2. The *provocation* to a libel furnished no matter of excuse, and could not be given in evidence for that purpose. If A. libels B., it is no legal excuse or justification for A. that B. had previously libelled him. The publication thus produced by way of excuse, was not specified in the notice, and ought not, therefore, to have been received in evidence.

Gold, contra. 1. The evidence of the defendant's having been indemnified by the author, was clearly inadmissible. The plaintiff's right of action against the defendant was as perfect as if he were the real author, against whom the plaintiff might, also, have his action, and ought not, therefore, to have the damages against the publisher enhanced, on the ground of an indemnity by the author. 2. It was perfectly proper and competent for the defendant to explain the cause and circumstances of the publication, to prove that there was no malice. It is like showing the subject matter, or whole conversation, to prove that there was no slander or malicious intent. (*Minors v. Leefend*, *Cro. Jac.* 114.) Suppose the defendant had recited the previous publication of the plaintiff *verbatim*, and then had proceeded to comment upon it, in the manner he has done, would not the *text* have justified the comment? The reference made to it is equally certain, and cannot be mistaken. The two publications, therefore, ought to be considered together.

In the case of *Williams*, alias *Anthony Pasquin*, against **Faulder*, for a libel, tried before Lord *Kenyon*, in 1797, his lordship permitted Mr. *Garrow*, the defendant's counsel, to read to the jury various passages from the different publications of the plaintiff, vilifying and libelling some of the most respectable characters, in order to show that the plaintiff was a notorious and infamous libeller, and therefore not entitled to ask for damages for a publication against himself. Lord *Kenyon* observed to the jury, "that it was their duty to consider, whether the author of such works as they had heard read and described had a right to call for damages. It appears to me," says he, "that the author of the *Baviad* (the work published by *Faulder*)

has acted a very meritorious part in exposing this man." The jury, without a moment's hesitation, found for the defendant. If the rule thus adopted by Lord *Kenyon* be correct, and it is certainly founded in principles of justice and self defence, the judge at the trial of the present cause was right in admitting evidence to explain the reason and motives which induced the defendant to publish the observations on the plaintiff, for which this action has been brought.

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SPENCER, J., delivered the opinion of the court. The plaintiff offered proof, in aggravation of the damages, that the defendant had been indemnified for the publication he had made. This proof was overruled; and its relevancy does not strike me. The circumstances of the defendant are not shown to have been bad or insolvent. Without expressing any opinion on a different state of facts, I think this evidence was properly rejected.

The defendant, under his notice, offered proof of the first publication, to which that of the defendant was an answer. The judge overruled it, as matter of justification, on some mistake in the notice; but admitted it in mitigation of the damages, and as explanatory of the subject matter, occasion and intent of the defendant's publication. The proof, under these circumstances, and for that purpose, I conceive proper, for otherwise the defendant's libel might not be intelligible. In charging the jury, the judge instructed them, *that the plaintiff, not having proved the truth of his charge against *Curtis*, the same must be deemed untrue; and that the defendant was well warranted in making the publication complained of, if it appeared to them, as it did to him, that he had confined himself in his strictures to the previous publication of the plaintiff, or had made no allegations extrinsic or foreign thereto.

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It does not appear to me that the plaintiff was bound to prove the facts of the first publication, or that he would be permitted to do so. *Curtis* was a stranger to these proceedings; and if his character or conduct could thus be drawn in question, the reputation of no man would be safe; for a fictitious suit might thus be instituted, for the purpose of destroying the fairest reputation in the community.

If in a wager, where the feelings or reputation of a third person may be involved, the court will not permit his character to be assailed, I cannot perceive any reason for allowing it under these circumstances. *Curtis* is not legally to be presumed to be prepared on a trial, *inter alios*, to defend himself.

It has not been controverted, that the defendant's publication, if untrue, was libellous; and I can never subscribe to the doctrine, that because *A.* has written a piece against *B.*, about the truth or falsehood of which the court know nothing, that *C.* can interfere, by lavishing his abuse on *A.* for that writing. It was, as I have observed, matter properly admitted

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in evidence that the plaintiff had written a piece to which the defendant's was an answer; and it might and ought to operate in mitigation of damages, that the plaintiff had assailed an individual in the public prints, who was holden up as a candidate for an elective office. But it having been admitted to be read in evidence, on a principle which I do not adopt, I think a new trial ought to be awarded, with costs to abide the event.

New trial granted.(a)

(a) In *Kennedy v. Gregory*, (1 Binn. Rep. 85.) it was held, that the defendant, in an action of slander, might give in evidence, in mitigation of damages, that a third person told him what he had related. See also *Morris v. Duane*, (1 Binn. 90. in note.)

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*JOHN LIVINGSTON *against* BISHOP.

Same *against* five other Defendants.

If separate suits be brought against several defendants for a joint trespass, the plaintiff may recover separately against each, but he can have but one satisfaction; and he may elect *de melioribus dominiis*, and issue his execution therefor against one of them; and the other defendants will be obliged to pay the costs of the suits against them respectively.(a)

THE plaintiff brought separate actions of *trespass* against the defendant, and five other persons, for a joint trespass. The defendant was the principal trespasser; the other defendants acted as his servants. Pending the suits, and before trial of either of them, the counsel on both sides entered into a written agreement, that the defendant *Bishop* should, upon the trial of the cause against him, be considered as answerable for the whole trespass committed by all the defendants; and in case a verdict should be found against him, and this court should be of opinion that the plaintiff would be entitled to costs in the other suits, after a trial and recovery against *Bishop*, as a joint trespasser, for the whole damages, then the other defendants were to pay the costs of their respective suits, otherwise not. The cause, afterwards, proceeded to trial, and a verdict was found against *Bishop*, the defendant; on which judgment was entered up, and an *execution* awarded, which has been paid and satisfied.

This case was submitted to the court without argument.

(a) *Osterhout v. Roberts*, 8 Cow. Rep. 44. *Morish v. Berry*, 7 Cow. Rep. 343.

KENT, Ch. J. On looking into the books, with a view to this question, I was surprised to meet with so much contradiction and uncertainty on the subject. The cases are not all capable of being reconciled to each other, and some of them appear to me not reconcilable with reason. It is, however, a proposition that is not controverted, but everywhere admitted, that, for a joint trespass, the plaintiff may sue all the trespassers jointly, or each of them separately, and that each is answerable for the act of all. It would seem to result from this doctrine, that a trial and recovery against one trespasser is no bar to a trial and recovery against another. If there can be but one recovery, it is in vain to say that the plaintiff may

bring separate suits, for the cause that happens to be first tried may be used by way of plea *puis darrein continuance*, to defeat the other actions *that are in arrear. The more rational rule appears to be, that where you elect to bring separate actions for a joint trespass, you may have separate recoveries, and but one satisfaction; and that the plaintiff may elect *de melioribus damnis*, and issue his execution accordingly; and that where he has made this election, he is concluded by it, and that if he should afterwards proceed against the other defendants, they shall be relieved, on payment of their costs. This is agreeable to the rule laid down in Sir *John Heydon's case*, (11 Co. 5.) where, in trespass against several, one appeared and pleaded not guilty to a declaration against him, with a *simul cum*, &c., and, afterwards, another appeared, and pleaded not guilty to a like declaration, whereupon separate *venires* issued, and the issues were separately tried, and separate and different damages assessed, and the court resolved that the plaintiff had his election of the different damages assessed, which should bind all, and that there should be but one execution.

The case of *Brown v. Wotton* (Yelv. 67. Cro. Jac. 73. Moore, 762.) stands, however, opposed to this view of the subject, and it merits some attention. That was an action of *trover* for certain goods, and the defendant pleaded a judgment and execution in behalf of the plaintiff, against one *I. S.*, for the same goods, and the plea was held good. (a) The court took a distinction between a demand, and a recovery of a thing certain, and of a thing uncertain; and they held that, in the first case, as where two are bound, jointly and severally, in a bond, a recovery and execution against one was no bar against the other, without satisfaction; but where the demand rests only in damages, as in trespass, a recovery and judgment against one was a bar against the other, for the uncertain demand is now made certain by the judgment, and the plaintiff shall not resort to the uncertain demand again. In this case, there was a judgment and execution in the first cause, and so far, therefore, as the opinion of the court goes to declare that a judgment alone constituted a bar, the opinion was extrajudicial. The principle, however, which the court went upon, between a demand for a thing certain *and a thing uncertain, applied equally to both cases; and yet, afterwards, in the case of *Claxton v. Swift*, (3 Mod. 86. 2 Show. 484.) which was an action of *assumpsit*, and, according to the forms of law, equally sounding in damages, the court held, that a recovery without satisfaction against the drawer, was no bar to a suit against the endorser of a bill. The principle of the first case may be considered, therefore, as in some degree shaken by this latter de-

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(a) In the case of *Drake v. Mitchell and others*, (3 East's Rep. 258.) Lord *Ellenborough* says, that a judgment alone is no bar until it be made productive in satisfaction to the party, and until then, cannot operate to change any other collateral concurrent remedy, which the party may have.

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cision; for, in the language of the case of *Brown v. Wotton* "the thing uncertain is, in both instances, made certain by the judgment, and altered and changed into another nature."

This case of *Brown v. Wotton* was clearly introductory of a new rule. It is laid down in *Brooke*, (*Judgment*, pl. 98.) that if two commit a trespass, I can have several actions against them, and recover the entire damages against each, and have execution; and one defendant cannot plead that the plaintiff hath recovered against the other for the same trespass, and taken him in execution. And in *Morton's case*, (*Cro. Eliz.* 30.) it was even made a question by one of the judges, whether a judgment and execution, with satisfaction, against one joint trespasser, could be pleaded by another trespasser; but the court held it reasonable that it should be a bar. And many cases subsequent to that of *Brown v. Wotton* seem to disregard it, and to make the satisfaction against one trespasser the test of the plea. Thus in *Cocke v. Jenner*, (*Hob.* 66.) the court held, that if trespassers be sued in several actions, the plaintiff may make choice of the best damages; but that when he has taken one satisfaction, he can take no more, and if he attempt it, an *audita querela* will lie. Again, in the case of *Corbet v. Barnes*, (*Wm. Jones*, 377.) the court said that for one assault, the plaintiff can have several actions, and recover; but, when recovery is had against one, and satisfaction, the plaintiff cannot have a second satisfaction, any more than where separate suits are brought upon a joint and several obligation. So late as the case of *Bird v. Randall*, (3 *Burr.* 1345.) Lord *Mansfield* advanced the same doctrine, and observed, that in case of a joint trespass, the defendants were all liable to the plaintiff, and he might proceed against any, or all of *them, as he pleased, yet he shall have but one satisfaction from them all.

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I am, therefore, inclined to question the extent of the decision in *Brown v. Wotton*, and to hold, that a recovery against one joint trespasser is not alone a bar to a suit against another. There must, at least, be an execution thereon, to bring a case within the facts on which that decision was founded; and that, perhaps, may be deemed an election by the plaintiff, *de melioribus damnis*, and sufficient to conclude him. The trial and recovery in the present case was, therefore, no bar to the other suits which were pending, and I conclude that the plaintiff is entitled, under the agreement, to the costs of the other suits. In the analogous case of a recovery in separate suits against the drawer and endorser of a note, the costs of both suits were to be paid. (*Windham v. Wither*, *Str.* 515. Our statute (*Laus*, sess. 24. c. 90. s. 14. vol. 1. 354.) allows a recovery of costs in one of the suits only; but this statute was an alteration of the former law, and it does not apply to suits in trespass. The case of a *unica taxatio damnorum* is, where the trespassers are sued jointly, and they sever in their pleas, and separate damages are assessed; and the reason of this is, that in judgment of

law, the several juries give but one verdict, at one time. (10 Co. 117. a. 11 Co. 7. a.) There is no case that I have met with, that requires a single taxation of costs where there are separate suits in trespass, or that excludes the plaintiff from his costs in all the suits in this case, any more than in the case of separate suits on one obligation, antecedent to our statute. The fact annexed to the case, that execution had been issued, and satisfaction received of the judgment against *Bishop*, is not material, as the present question arises upon the agreement.

The opinion of the court, accordingly, is, that the plaintiff is entitled to his costs in each of the suits, up to the time of the agreement, together with the costs of the present application.

THOMPSON, J., and TOMPKINS, J., concurred.

LIVINGSTON, J., and SPENCER, J., gave no opinion.

Rule granted.

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POWELL.

*CHAPMAN *against* LIPSCOMBE and POWELL.

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THIS was an action on an inland bill of exchange against the defendants as drawers. The cause was tried at the *New-York Sittings*, the 27th of *April*, 1805, before Mr. Justice *Thompson*, when the jury found a verdict for the plaintiff.

The defendants, who are merchants, residing at *Petersburgh* in *Virginia*, drew the bill in question, for 391 dollars and 33 cents, at 6 months' sight, dated "*New-York, April 15, 1803*," on Messrs. *Hackley & Fisher* of *New-York*, by whom it was accepted.

When the bill became due, payment was demanded of the acceptors, which was refused. The bill having been protested on the 18th of *October*, 1803, the clerk of the notary on the same day, or the day after, put two notices into the post-office, in the city of *New-York*, one directed to the defendants, at *Norfolk*, in *Virginia*, and the other to the defendants at *New-York*, informing them of the protest for non-payment. The clerk testified that he made diligent inquiry after the defendants, at the banks in *New-York*, and elsewhere, and the information was, that they resided at *Norfolk*. The plaintiff was absent from the city at the time.

Several bills had been drawn at the same time, by the defendants, on *Hackley & Fisher*, one of whom testified, that they were not furnished with funds belonging to the defendants sufficient to take up all the bills. By an account current, however, it appeared, that after charging all the bills, there was but a small balance due the acceptors.

One *Whitlock*, to whom the bill had been endorsed by the

A bill was drawn and dated at *New-York*, on persons residing there, who accepted it. The drawers, in fact, resided at *Petersburgh* in *Virginia*. The bill being protested for non payment, on the same or next day, two letters were put in the post-office, giving notice to the drawers, one directed to *New-York*, and the other to *Norfolk*, the supposed place of their residence.

It was held, that as it did not appear that the holder knew where the drawers lived, he had used due diligence, and that the notice was sufficient. (a)

(a) *Miller v. Hackley, 5 Johns. 375. Ireland v.*

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Kip, 10 Johns.
493. *Bank of*
Utica v. De Mott,
13 *Johns.* 439.
Raid v. Payne,
16 *Johns.* 218.
Cuyler v. Nellis,
4 *Wend. Rep.*
398. *Bank of*
Utica v. Davidson,
5 *Wend. Rep.*
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present plaintiff, and who had taken it up at the bank, and held it after it became dishonored, testified, that in *April*, 1804, he called on *Lipscombe*, one of the defendants, for payment; *Lipscombe* admitted the bill to be his, and said he would make arrangements for payment; that he had *no means then, but would call and pay it before he left town.

A motion was now made to set aside the verdict, and for a new trial: 1. For the misdirection of the judge; 2. Because the verdict was against evidence.

Three points were raised in the argument of this cause.

1. That no notice was given to the drawers of the bill of its having been dishonored; 2. That no notice was necessary, as there were no funds of the drawers in the hands of the acceptors; 3. The subsequent promise by the defendant, *Lipscombe*, to *Whitlock*, was a waiver of the want of notice, and will enure to the benefit of the plaintiff.

As the court decided the cause on the first point, and declined delivering any opinion on the other two, it is unnecessary to state the arguments of the counsel, further than as they apply to the first question.

Byrd, for the defendant, contended, that there was no evidence whatever, of any notice having been received by the defendants. The defendants reside at *Petersburgh* in *Virginia*; a fact which the plaintiff must have known, or which might have been easily ascertained by inquiry of the acceptors, or other persons who transact business with the defendants. The least that can be required of the *holder*, is, that he should send the notice by *post*, or by the first conveyance, to the place where the *drawer* resides; and if he does not know that place, he ought to make proper inquiries to ascertain it.

Here, a stranger, a clerk of the notary, made inquiry at the banks, and was informed, as he says, that the defendants lived at *Norfolk*; but if he had taken the trouble to have inquired of the acceptors, the very persons to whom he presented the bill for payment, he would have learned the real place of their residence. There is, therefore, a want of due diligence in making the inquiry, a negligence and inattention on the part of the plaintiff, or his agent, which the general plea of ignorance cannot excuse. Sending a letter to *Norfolk* under these circumstances, cannot amount to an actual or constructive notice; he might as well have sent it to *Philadelphia*, or any other place; for the postmaster at *Norfolk*, it is to be presumed, did not know that the defendants lived at *Petersburgh*; and the letter would remain in his office until it was called for.

Baldwin, contra. The bill was drawn and accepted in the city of *New-York*, and the presumption from the face of it was, that the drawers lived at *New-York*; all that the law would require, in such a case, would be that the notice should

be given at *New-York*. If the drawer dates his bill at a particular place, the holder is not bound to seek him elsewhere.

If he is not to be found at the place where the bill is dated, and has never lived there, the holder is not obliged to look farther.† A different doctrine would operate as an intolerable hardship on the holder, and greatly clog the negotiability of bills and notes. All that can, in justice, be required of him, is, that he should use reasonable diligence.

Per Curiam. Without discussing or deciding on the point, whether the subsequent promise of *Lipscombe* to *Whitlock*, was a waiver of notice, we are of opinion, that due notice of the dishonor of the bill was given. The bill was drawn and dated at *New-York*, and there is no evidence that the plaintiff knew that the defendants resided at *Petersburgh*; he inquired at the banks and elsewhere, and being informed that the drawers resided at *Norfolk*, he sent a notice by post to them, and another addressed to them at *New-York*; this is sufficient, and all that ought to be required of him. He has used due diligence. Being of that opinion, it is unnecessary to examine the other points or whether the charge of the judge was correct or not

Rule refused.(a)

(a) See *Miller v. Hackley*, (5 Johns. Rep. 375.)

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† Bayley on
Bills, 56.

*FOSTER against SCOFFIELD.

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THIS was an action of trespass, for assaulting, beating, seducing, debauching and getting with child the daughter of the plaintiff, *per quod sevitium amisit*. Plea, *not guilty*. The cause was tried at the *West Chester* circuit, on the 21st of May, 1805, before Mr. Justice *Livingston*.

The plaintiff produced his daughter, who proved the seduction, &c. She was then asked by the plaintiff's counsel, whether the defendant had promised her marriage, previous to that fact. This question was objected to on the part of the defendant; but on the plaintiff's counsel offering to stipulate that the witness should not bring any action on account of the breach of such promise of marriage, the judge, though the question was still objected to on the part of the defendant, suffered it to be put to the witness, who answered, "that the defendant did promise her marriage before any connection between them, and that she yielded to his solicitations, in consequence of that promise."

The judge charged the jury that they might give the plaintiff damages, not only for the injury alleged in the declaration, but also such damages as they might think the witness entitled

In an action brought by the father for the seduction of his daughter, the daughter cannot be a witness to prove a previous promise of marriage, in aggravation of damages; for she has her own right of action for the breach of the promise. (a)

(a) *Clark v. Fitch*, 2 Wmd. Rep. 464.

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to, had she brought a suit for a breach of the promise of marriage. The jury found a verdict for the plaintiff, for five hundred dollars damages.

A motion was now made to set aside the verdict, for the misdirection of the judge.

Woods, for the defendant, was stopped by the court.

T. A. Emmet, for the plaintiff. The objection is, that the daughter's testimony as to the promise of marriage, ought not to have been received, because she has a *direct interest* to prove the fact. But as the damages are to go to her father, she has no direct interest in the event, nor any immediate benefit to be derived from the verdict. She has no greater or more direct interest in the increase of damages than every child has in an action where such child is a witness *for the parent. If she was a *competent witness*, the objection of interest cannot be urged against her answering any question whatever; her answer must be left to be weighed by the jury, as to her credit, under the circumstances in which she appears before them.

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[KENT, Ch. J. The difficulty is, that in this way you do, in effect, make the daughter a witness in her own cause.]

But if she were incompetent, yet she has agreed to bring no action against the defendant, thereby relinquishing her right, and removing all objections to her competency. This sort of action has, of late years, been much freed from those technical rules by which it was originally framed. It is now no longer a mere remedy for loss of service. That is used as mere form or color of action. In the case of *Bedford v. McKowl*,† where the counsel objected to the admission of any evidence, but what applied to the loss of service, Lord Eldon said, "In point of form, the action only purports to give a recompense for loss of service; but we cannot shut our eyes to the fact, that this was an action brought by a parent for an injury to her child. In such case I am of opinion, that the jury may take into consideration all that she can feel from the nature of the loss." If, in any case, the damages ought to be exemplary, this is one. The defendant ought to smart for his breach of honor and good faith, and to suffer for such gross misconduct. If the misconduct of the defendant be aggravated by his previous promise of marriage, why not permit the plaintiff, according to the more liberal views of this form of action now prevailing, to give that aggravation in evidence? If it can be given in evidence at all, why not prove it by the daughter, who is allowed to be a competent witness, in every other respect, at least, as well as by a stranger, or third person, especially when she consents to waive all right of action herself, on that account?

† 3 Esp. Cas.
119.

‡ 2 Term Rep. 4.

In the case of *Elmonson v. Machell*,‡ which was an action brought by the aunt for an assault of her niece, in which dam
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ages were also given for the injury sustained by the niece; the court on the niece's consenting not to try her *action, refused to set aside the verdict, on any strict point of law, believing that no more than justice had been done between the parties.

[SPENCER, J. It does not appear, from the report of that case, that the niece was the witness who proved the assault.]

Benson, on the same side. In all cases of mere *tort* for implied damages, every matter which may weigh in the estimation of damages, ought to go to the jury. In almost every case of this kind, there is a promise of marriage, and whether there is, or is not, such a promise must enhance or diminish the injury. The daughter ought to be admitted as a witness; it is for that very reason that the action is brought in the name of the parent. The form is *mere fiction*; the object of the suit is to obtain reparation for the injury done to the family. On all trials of actions of this kind, the question is, Did the defendant visit you in the way of courtship? This is tantamount to asking her, Did the defendant promise you marriage?

[LIVINGSTON, J. I am convinced that the admission of this testimony, and my charge to the jury, were both incorrect. The daughter was not only interested to say what she did in support of her own reputation, but was swearing, to enable the father to recover in an action for the loss of his daughter's service, compensation for a breach of the promise of marriage, in itself a substantive and distinct cause of action, and with which he had nothing to do, and against which the defendant would not be ready to defend himself. Testimony of this nature has never been admitted in *England*.]

Per Curiam. The law is settled,† that in a suit by the father, for debauching his daughter, the daughter cannot be a witness to prove a promise of marriage, in order to increase the damages, for she has herself a right of action against the defendant. The father's action is for a *tort*; that of the daughter is for a breach of the contract made between her and the defendant.

New trial granted.

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May, 1806.

LESTER
v.
THOMPSON &
WHITE.

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† See *Tullidge*
v. *Wade*,
Wils. 18

*LESTER against THOMPSON and WHITE.

ON the trial of this cause, the defendants offered in evidence, their discharge under the insolvent act. It was attempted, on the part of the plaintiff, to show that the discharge was void, on account of fraud. The fact alleged in proof of the fraud, was the stating, in their account to the judge, that the plaintiff

[* 300]
A discharge
under the insol-
vent act, is con-
clusive as to the
facts set forth,
and cannot be
avoided, except
for the particu-
lar causes or
frauds specified
in the statute

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† *Greenleaf's*
edit. of the *Laws*
of *New-York*,
vol. 1. p. 280.
11th section of
the act.

was their *debtor*, when, in truth, he was a considerable *creditor* of the defendants. The proceedings took place before the last revision of the laws, and the fact now alleged as a fraud, does not appear to be included among those which are declared to be fraudulent by the former act,† so as to render the discharge void.

D. B. Ogden, for the plaintiff, contended, that though this particular act was not expressly declared to be fraudulent in the statute, yet there was no doubt that it was a fraud on the creditors, and that any act of fraud, whether specified in the act, or not, was sufficient to avoid the discharge.

Harrison, contra. If the legislature had been silent on the subject, there would be some reason for saying that the rules of the common law about fraud would be applicable. But where the legislature have undertaken to specify the particular acts or frauds which shall render the discharge void, the statute is conclusive, and you cannot inquire into any other frauds than those enumerated. The maxim in this case is, *expressio unius est exclusio alterius*. It is true, that in the revised laws,† a clause has been inserted which meets the present case; but this shows the opinion of the framers of this law, that the former act did not embrace a case like the present.

† Vol. 1. p. 434.
sess. 24. c. 90.
s. 12.

Per Curiam. The discharge is conclusive as to the facts stated in it, except as to those particular acts or frauds expressed in the eleventh section of the statute. The fact now alleged is not one of those mentioned. The plaintiff should have contested this question before the judge, before the discharge was granted; he is now too late in his *objection, and is precluded by his own default from contesting the validity of the discharge on that ground.

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Judgment for the defendants.

NEILSON and others against THE COLUMBIAN INSURANCE COMPANY.

Policy of insurance on a cargo of corn and flour from New-York to Madeira, with the usual memorandum. In her passage the vessel met with bad weather, and, arriving in sight of Madeira, was prevented by ad-

THIS was an action on a policy of insurance on the cargo of the schooner *William*, on a voyage from *New-York* to *Madeira*. The goods consisted of corn, flour, and a small quantity of beef, and were specifically enumerated and valued in the policy, which contained the usual memorandum in regard to fruit, grain, &c., being free from average, &c.

The defendants had paid into court *five hundred and ninety-seven* dollars, under a plea of tender.

The cause was tried at the *New-York Sittings*, on the 17th of *December*, 1805, before Mr. Justice *Livingston*.

This cause having been tried before, and a new trial granted, it will be necessary only to refer to the report of the case, in 3 *Caines*, 108. and to take notice of such facts as did not appear on the first trial, or the points that were not raised on the argument of the former motion to set aside the verdict.

The plaintiff produced witnesses to prove that it was impracticable, under existing circumstances, for the vessel to have returned to *Madeira*, or to have gone to *Lisbon*; and that it was prudent, and the best measure, to go to the *Cape de Verd Islands*; that had the vessel gone to *Mogadore*, she might have obtained provisions, but not repairs; that it is very difficult to get repairs at the *Cape de Verd Islands*, as the supply of the requisite materials depend on casual arrivals, or wrecks.

The defendants offered in evidence the case made on the former motion for a new trial, corrected before the *judge, in order to contrast the testimony of the plaintiffs' principal witnesses, the two *Cavallos*, delivered on the first trial, with their depositions read at the second, and thereby to lessen their credibility. The plaintiffs objected to this species of evidence; but it was admitted by the judge. The charge to the jury was strongly in favor of the defendants, on the ground of deviation; and that the vessel might have been repaired, so far as to have enabled her to return to *Madeira*, and complete the voyage. The jury found a verdict for the defendants.

The motion to set aside the verdict was grounded on the following points: 1. The case made at the former trial was improperly admitted to impeach the credit of the plaintiffs' witnesses; 2. The plea of tender concluded every question as to the plaintiffs' right to recover, and confined the inquiry merely as to the amount; the fact of deviation ought not, therefore, to have been left to the jury; 3. That the verdict was manifestly against evidence; 4. That the judge misdirected the jury.

The counsel for the defendants objected to the arguing the motion for a new trial, as there had been no order to stay the proceedings, and a judgment had been entered on the verdict. The judge who tried the cause, refused to grant the order, and on application to the court, it was also refused. It appeared, however, that the *postea* had been filed, and the rule for the judgment entered on the first day of the present term, and that the *four* days were not expired, nor the judgment perfected. The court said, this is not like the case of *Shepherd and Case*; (*Coleman*, 90.) there the judgment had been duly entered. We will hear the motion argued.

T. L. Ogden and *Hoffman*, for the plaintiff. The report of the evidence given by a witness on a former trial, contained in a case, ought not be received to impeach his credit before a second jury. The manner in which these cases are usually

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May, 1806

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INS. CO.

verse winds from going into port; and suspecting a ship in sight to be a privateer, the master bore away, and, falling into the trade winds, went to the *Cape de Verd Islands*; where the cargo being

[* 302] found much damaged, was ordered to be sold by the government there. Not being able to repair the vessel, the insured broke up the voyage and abandoned as for a total loss; but the vessel, afterwards, got some repairs and went to *Lisbon*. It was held, that going to the *Cape de Verd Islands* was not warranted by necessity, and therefore a deviation. The evidence stated in a case made on a former trial cannot be admitted to impeach the testimony of the same witness given on a second trial of the same cause.

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Ins. Co.

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made is well known; they are settled from the loose notes of the counsel, corrected by the notes or recollection of the judge, before whom the cause was tried, weeks after the trial; facts are often inserted from the mutual *concession of the counsel; and it would be extremely unjust to permit the character of a witness to be impeached by the evidence of persons not under oath, and given from an imperfect recollection of what had passed at the trial. This cause has not, therefore, gone to the jury in a proper manner, and the court are unable to say, how far the improper admission of such evidence may have influenced them in forming their verdict.

[LIVINGSTON, J. There is no contradiction whatever in the testimony.]

The point in controversy was not the quality or condition of the cargo. The loss was referred to the state of the vessel, or her utter incapacity to reach the place of destination. If the loss of the voyage was in consequence of the bad condition of the vessel, the *memorandum* in the policy was not to be taken into consideration. If the vessel was incapable of proceeding in the voyage, and there was no possibility of making the necessary repairs, the state of the cargo would not affect the plaintiff's right to recover on the ground of the voyage having been defeated.

The counsel then went into an examination of the facts in the case, to show the necessity which compelled the vessel to go to *Bonavista*, in her disabled state, and the impossibility of obtaining the necessary repairs; that every thing was done which was prudent and proper, on the part of the insured, who were, therefore, justifiable in breaking up the voyage at *Bonavista*, and might claim of the insurers an indemnity for a total loss. The fact, they said, that the cargo was ordered to be sold by the government, would alone authorize the abandonment. It was so decided in the case of *Dyson and others v. Rowcroft*,† which is perfectly analogous to the one now before the court.

† 3 Bos. & Pull.
474

By the tender, all the facts which would entitle the plaintiffs to recover, were admitted, and the only question for the consideration of the jury was the amount of the damages. Yet the judge referred the question of the *deviation* to them, and gave a very decided opinion on that fact, as well as on the whole merits of the case.

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**Bogert*, contra. The evidence given at the first trial was produced to contrast it with the depositions of the same witnesses read on the second trial. There was no essential variation between them; and it might be considered as supplementary, or explanatory of the depositions. The case having been settled before the judge, must be considered as correct
240

It is as proper evidence as that of a witness to prove what another witness said on a former occasion.

The tender did not exclude the right of inquiring into the deviation. There was a *jettison* of a part of the cargo previous to the deviation. The tender was for what might be found due; and without it there was nothing by which the jury could have ascertained the damages occasioned by the *jettison*.

There was no necessity of going to the *Cape de Verd Islands*. The propriety or necessity of going there, under all the circumstances, was a fact which the jury were to decide. They have found against the plaintiffs, and the court will not lightly disturb their verdict. In the case of *Dyson v. Rowcroft*, the ship was wholly unable to proceed to the port of destination, and was sold, which of course put an end to the voyage.

Pendleton, on the same side, was stopped by the court.

Per Curiam. The admission of the case made on a former trial, as evidence to show what the witnesses then swore in order to discredit them at the second trial, was improper. The case is not evidence *upon oath*. It may have been made up by consent, and the points in contradiction may not have been particularly attended to by the judge before whom it was corrected. The case is conclusive against the parties, as to the facts contained in it; but not against third persons, whose veracity or credit is called in question. Though the case ought not to have been received in evidence, yet, in fact, it contained nothing to contradict or discredit the witnesses, and could not have influenced the decision of the jury. There was evidence of a deviation; a departure from within sight of *Madeira* to the *Cape de Verd Islands*, a distance of 1,000 miles, without a real necessity. If there had been a necessity for the deviation, still the vessel might have returned to *Madeira*, with little or no repairs; there was no adequate or justifiable cause for breaking up the voyage. On the whole, the verdict appears to be warranted by the evidence, and agreeable to the merits and justice of the case.

Postea to the defendants.

SNELL, STAGG & Co. against RICH.

THIS was an action on the case. The cause was tried at the *New-York Sittings*, on the 10th of *January*, 1806, before Mr. Justice *Livingston*.

The declaration stated that the plaintiffs were the owners of

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& Co.
v.
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A vessel ran
foul of another
vessel lying at
anchor, and car-
ried away her
bowsprit, and

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did her other injury. The vessel that caused the injury was sailing out of the harbor with a pilot on board, and the master was on shore at the time of the accident. In an action brought by the owners of the injured vessel, against the master of the other vessel, it was held, that the master was not liable for the damage. A pilot, while on board, has the exclusive control and direction of the vessel, and is considered as master [*306]
ter pro hac vice.
Query, whether the owners of the ship are liable for the conduct of the pilot?

† Tomlins' edit.
Voc. Pilot.

a vessel called the *Lapwing*, lying at anchor in the *East River*, in the harbor of *New-York*, and the defendant being in possession of another vessel, called the *Amphion*, then sailing and navigating on the said river, and that the defendant so carelessly navigated and managed the said ship *Amphion*, that she ran foul of the plaintiffs' vessel, carried away her bowsprit, &c. &c.

The facts stated in the declaration were proved. There did not appear to have been any carelessness to be imputed to the pilot, or the defendant, who was the master of the *Amphion*. The *Amphion* had made sail from the wharf, bound up the river, to pass through the *Sound*, and had taken on board a branch pilot to conduct her through *Hell Gate*. The defendant was not on board at the time the accident happened.

The judge stated to the jury, that he was inclined to believe, that as the master was not on board, and the *Amphion* was under the direction and charge of the pilot, that no action could be maintained against the master.

The point of law was reserved, and the jury found a verdict for the plaintiffs; but it was agreed, that if the court should be of opinion, on the question of law, against the plaintiffs, then a judgment of nonsuit was to be entered.

W. Morton, for the plaintiffs. The only question in this case is, whether the pilot on board of a ship has such an entire and exclusive command and direction of the ship, that *the master is not to be responsible for any thing happening during the time the pilot is on board. *Jacob*, in his *Law Dictionary*,† defines a pilot to be a person who has the government of the ship under the master. (a) If this be correct, and the master has any control over the conduct of the pilot, he must be answerable for his acts, and it makes no difference whether the master was on board or not.

Bogert, for the defendant. Every man is answerable for his own acts, or those of his agent. Here the pilot acted for the owner. The plaintiffs must look either to the pilot, or the owner. The pilot has the entire control and management of the ship, and is answerable for her safety, while on board; he supersedes the master in the command. Here, in fact, the master was not on board, and the acts of the pilot cannot, in any sense, be imputed to him. The master is an intermediate person, a middle man, against whom no action lies.‡

† *Stone v. Cartwright*, 6 Term. Rep. 411.

LIVINGSTON, J. Do you admit the owner to be liable?

Bogert. I do not mean that, but only that the intermediate person is not liable.

(a) By the laws of *Oleron*, art. 23. if a pilot failed in his duty, or the vessel miscarried, through his ignorance, he was obliged to make good all damage to the merchant, or lose his head. See *Molloy de jure maritimo*, book 2. c. 9. s. 3. and 7. *Abbot*, 140. By the laws of most maritime states, masters of vessels are compelled to take pilots on board.

KENT, Ch. J. I shall give no opinion as to the liability of the owner. NEW-YORK
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LIVINGSTON, J. It is universally understood that the pilot, while on board, has the absolute and exclusive control of the ship; and I am prepared to say, that if the master had been on board, he would not have been responsible. LARRABEE &
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Per Curiam. As the master was not on board, he certainly was not master at the time of the accident. The pilot must be considered as master *pro hac vice*. The defendant, therefore, is not liable as master; and it does not appear that he was owner. But we give no opinion whether the owner would be liable or not.

Judgment of nonsuit.

*LARRABEE and Wife against VAN ALSTYNE.

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THIS was an action of *dower*. The claim of the demandants was resisted on the ground, that by the will of *Cornelius Van Alstyne*, the late husband of *Mrs. Larrabee*, she was barred of her dower. The testator bequeathed to his wife certain specific articles of household furniture, and forty pounds in money, to be paid at the times therein mentioned, and then declares, "that this bequest and devise shall be understood in no other sense than to be in lieu and stead of every other claim and pretension my said wife can or may have on my estate." Thirty-seven pounds had been paid to *Mrs. Larrabee*, but it did not appear with certainty on what account it was paid.

A husband devised certain articles, and forty pounds in money; to his wife "in lieu and stead of every other claim and pretension on his estate." It was held, that this legacy and bequest, did not bar the wife's right to dower at law. (a)

The case was submitted to the court without argument.

(a) *Van Orden v. Van Orden*, 10 Johns. 38. Jackson v. Churchill, 7 Crw Rep. 287

SPENCER, J. The bequest to the wife is not expressed to be in lieu or recompense of dower; and it is questionable whether, if such were the expression, and if the collateral recompense had been paid, the heir could have defended himself at law. It is not necessary to decide that point; I consider it well settled, that to bar this claim, the devise must expressly declare the thing given to be in bar of dower. (2 Ch. Cas. 24. 2 Vern. 365. Eq. Cas. Abr. 218, 219.) Had the will gone so far, and if even the donation of a sum of money would furnish a defence, yet here the tenant fails, on the ground, that the sum given has not been paid. The demandants must have judgment.

THOMPSON, J. The first question that arises is, whether this is to be considered a bequest in lieu of dower. I am inclined to think it must; though the testator does not expressly say that it is to be in lieu of dower, his meaning and intention cannot be misunderstood; he declares it to be in lieu of

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Wife

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every other claim and pretension to his estate. To ascertain the intention of the testator is a cardinal rule in the construction of wills, and such intention, *when discovered, must be carried into effect, as far as is practicable; when it is manifestly the intention of the testator, that the devise or bequest to his wife shall be in lieu of dower, she has her election to take either the one or the other, but cannot have both. Whether, in the present case, Mrs. Larrabee did accept the legacy or not, under such circumstances, as to determine her election, may, perhaps, admit of doubt; but, admitting her to have made her election, I should not consider it a bar of dower at law. It is, I think, a well settled rule, that collateral satisfaction is not pleadable at law, in bar of dower. To render a provision to the wife by will a legal bar of dower, it must consist of lands given or assured unto her for life; but a sum of money, or other chattel interest, given by will in lieu of dower, will, if accepted by the wife, after her husband's death, constitute an equitable bar of her dower; and this seems to be the distinction recognized in all the cases on the subject. It is a rule of chancery to give the widow her election to accept of the testamentary provision, or to refuse it, and betake herself to her dower at law; and even to allow her this election, after acceptance and enjoyment, for a considerable time, of the testamentary provision, if it appears that she acted without full knowledge and understanding of her true situation and rights, and of the consequence of her acceptance. (*Co. Litt.* 36. b. and *Hargrave's Notes.* 9 *Vin.* 249. 1 *Eq. Cas. Abr.* 218. 2 *Bac. Abr. Gwillim's* edit. 383. and the numerous cases cited in the notes.) My opinion, therefore, is, that the plaintiffs are entitled to judgment.

KENT, Ch. J., was of the same opinion.

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LIVINGSTON, J. If the legacy had been accepted, and receipts given, in the manner directed by the will, a doubt would hardly be entertained of the widow's being barred of dower, notwithstanding certain dicta, that such an estate cannot be defeated by collateral recompense. At present, it is certain, and it is strange that it should ever have *been doubted, if a widow accept of any matter under a will, be it land, money or goods, in lieu of dower, that she is thereby barred; and, in my opinion, this may be pleaded either at law or in equity. The only case which seems to deny this position is *Lawrence and Lawrence*; (2 *Vern.* 365.) the single point, however, there determined, and even that was reversed, was, that though a devise be not declared to be in bar of dower, yet, if it appear it was so intended, it shall have that effect. The chancellor adds, that "a collateral satisfaction may be a good bar in equity, though not pleadable at law." This, evidently, means, that it belongs only to a court of equity to say whether a devise be really made in bar of dower; but if a widow ac-

cept it *as such*, and give a receipt or release, that court has no right to prevent its being pleaded at law. A case of this kind is not to be found; why may not a widow release a right of dower, as well as any other right, and on what consideration she pleases? Whether she receives a cent or more, so that she be not imposed on, is nothing to the purpose. Such releases are every day executed, but I never supposed that their validity could be examined and established only in a court of equity, any more than a bond or other instrument executed by a widow. There can be no risk, therefore, in saying, that if a woman acknowledge, in writing, an acceptance of any valuable consideration whatever, in lieu of dower, she shall not afterwards be permitted to sustain a suit for it here.

But the difficulty in this cause arises from the tenant's having no evidence on *what account* his payments were made, or that they were in full; he ought to have satisfied the jury on these points, and not having done it, the verdict cannot be disturbed.

TOMPKINS, J., concurred.

Judgment for the demandants.

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May, 1806.

BAYARD
V.
MALCOLM

*BAYARD *against* MALCOLM.

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BENSON opposed the hearing of the motion in arrest of judgment in this cause. He contended, that it must be made within the first four days of the term next after the verdict, or that an order should be obtained to stay proceedings until a further day for that purpose. In this case, notice was given for the first day of *February* term, that a motion would be made in arrest of judgment, and for a nonsuit, or a new trial. This notice was not served until *Friday*, the 7th of *February*. No order for staying proceedings was granted until the first four days of the term had elapsed.

Harison. contra. No notice of the motion in arrest of judgment was necessary. When the certificate for staying proceedings was granted, it was understood, that the motion in arrest of judgment, and for a new trial, might be made at any time before judgment was entered up and perfected. This is agreeable to the practice of the *English* courts;† and where our rules have not provided for a case, or appear doubtful, this court adopts the *English* practice. (a)

Per Curiam. If the defendant file his reasons in arrest of judgment, within the first four days of the term, next after the

Practice
Where a certificate to stay proceedings in a cause is obtained, it amounts to an enlargement of the four day rule nisi, and a motion in arrest of judgment may be made at any time or term subsequent, and before the judgment is entered up and perfected.

† *Douglas*
745. *Taylor v.*
Whitehead.

(a) See *Dubois v. Phillips*, (5 Johns. Rep. 335.)

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v.
DUNCAN.

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verdict, and judgment is also stayed by a judge's certificate, the defendant is at liberty, at any time, or term thereafter, during the existence of the certificate, and while it is in force, to move in arrest of judgment. According to the *English* practice, the certificate to stay proceedings amounts to an enlargement of the *four day rule nisi*. If it were otherwise, the defendant would for ever preclude himself from making his motion for a new trial, unless time were given by a special rule; for that motion, according to the course of business, can never be brought on within the first four days; so that these special rules would be requisite in every case, and become *rules of course; and we may as well at once consider the certificate for staying proceedings, as amounting to an enlargement of the rule *nihi*.

N. B. The counsel not agreeing to consolidate the two motions, the court said, that as the motion in arrest of judgment was a non-enumerated motion, they would first hear the one for a new trial; afterwards, the counsel agreed to consolidate them, and the cause was argued on both; but the court gave no opinion this term.

The PEOPLE, at the relation of CUNNINGHAM, against
DUNCAN.

A surety in an administration bond cannot maintain an action against his co-surety for a default in the principal, if such surety has not been damaged, even though he be a creditor. If the right of suing on the administration bond is abused, this court will interfere and set aside the proceedings.

A SUIT had been commenced, at the instance of *William Cunningham*, on an administration bond. The present defendant and *Cunningham* were co-sureties for *James Mavor*, in the bond taken by the surrogate, on granting administration to *Mavor*, on the estate of *Robert W. Halstead*, deceased. The bond is in the usual form, conditioned, among other things, to make and file an inventory of the goods, chattels and credits of the deceased, with the surrogate, within six months, in the manner prescribed by the act.† The administrator neglected to file the inventory within the time, and the suit was brought for the breach of the condition. It appeared by the affidavit of the defendant, that *Mavor* was absent from the state, and was expected to return soon; and that *Cunningham* was not a creditor of *Halstead*.

† *Laws of N. Y.*
vol. 1. p. 320.
sess. 24. c. 77. s.
10.

‡ *Canterbury v*
House, Cowper,
140.

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Boyd, for the defendant, moved to set aside the proceedings in this cause. He said that as the *relator*, *Cunningham*, was a co-surety with the defendant, no suit could be maintained by him,‡ not even if he were a creditor. But the plaintiff is not a creditor. He merely swears that he is a creditor of *Halstead & Co.*, of which firm he was a partner. If *Duncan* has interfered with any property belonging to *Cunningham*, he is liable *in a different action. The co-obligor cannot maintain an

action against his co-surety, unless he has paid the money, and then only for a contribution. This is a vexatious suit. The bond is for fifteen thousand dollars, and the defendant has been held to bail to that amount.

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May, 1806.
ANONYMOUS

Woods, contra.

Per Curiam. This court, if they see that the right of suing on the administration bond is abused, will interfere, and set aside the proceedings. Here one surety on the bond brings an action against his co-surety, for an alleged default in the administrator, before he, or either of them, has been damnified in any way *as surety*. (a) No suit will lie at law, at the instance of a co-surety in such a case.

The proceedings must be set aside, with costs.

Rule granted.

(a) *Taylor v. Mills & Magnell*, (Coop. 527.) *Tom v. Goodrich*, (2 Johns. Rep. 465) *Bluby v. Champlin*, (4 Johns. Rep. 461.)

ANONYMOUS.

THE insured in making up the account of their loss on an open policy, charged the price of their goods, and a commission of five *per cent.* for the purchase of them *by themselves*.

The insured, in making an account of loss on an open policy, cannot charge a commission on the purchase of the goods by themselves.

Per Curiam. There is no evidence of any usage or practice, to support the charge of a commission in such a case.

ANONYMOUS.

THE court decided, that the crier is entitled to fees for *ringing the bell*, and *calling the action*, at the *sittings* and *circuit*, in all cases in which the costs were not yet taxed; and that this was to be the rule in all future cases.

Practice as to crier's fees at circuits and sittings.

*ANONYMOUS.

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A MOTION was made to set aside an inquest taken by default, on an affidavit of *merits*. Counter-affidavits were offered on the part of the plaintiff.

Practice See 2 Caines, 30.

Per Curiam. Counter-affidavits are not to be received in such a case.

Rule granted.

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May, 1806.

CORTELYOU
v.

VANBRUNDT.

CORTELYOU *against* VANBRUNDT.

Such of the inhabitants of the city of New-York as are not members of the corporation, or made free of the city, in the manner prescribed by the charter, are not exempted from serving on juries out of the city. That exemption extends only to the mayor, aldermen and commonalty, and freemen, or persons made free of the city.

BALDWIN, in behalf of the defendant, moved to vacate the rule entered for the trial of this cause by a *foreign jury* from the city and county of New-York. He read an affidavit, stating that the parties had been prepared for trial at two circuit courts held in *King's* county, and a sufficient number of jurors did not attend, though they had been regularly summoned, and particularly requested to attend. He observed, that by the charter of the city of New-York, none of the members of the corporation, or any of the free citizens of the city, could be compelled to serve as jurors out of the city; and as the judge at the circuit had no power to fine the jurors, or to compel their attendance in any way, there was no probability that a sufficient jury could ever be obtained. The present rule ought, therefore, to be vacated.

Harison and Hoffman, contra. The term, *free citizens of the city*, means persons *free of the city*, and not every *inhabitant*. Free citizens are such as are made free of the city, under the *common seal*, in the manner prescribed by the charter. Not one person in a hundred has sued out that privilege; for since the revolution it is of little value, as new qualifications for electors have been created. There was, therefore, a sufficient number of persons in the city of New-York, who cannot claim the privilege of exemption contained in the charter, and there will be no difficulty *in finding means to compel their attendance at the next court.

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Riggs, in reply. The exception extends to every *corporator*, or inhabitant of the city: all are comprised under the terms *mayor, aldermen, commonalty, and free citizens*. The act of the legislature,† by which the privilege of electing *charter officers* has been extended to all persons of full age, renting a tenement of the yearly value of 25 dollars, &c., has, in fact, made such electors *corporators*, by declaring them to be "entitled to all the rights and privileges of freemen of the city."

Per Curiam. The exemption from serving on foreign juries, contained in the charter, is confined to the *mayor, aldermen, commonalty, and free citizens*, that is, such persons as are made free of the city, according to the charter. The privilege does not extend to the inhabitants, or freeholders generally.

Rule refused.

† *Laws of N. Y.* vol. 3. p. 487.
sess. 27. c. 62.
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GOLDEN moved for a *struck jury*, on an affidavit, stating that the action was on a policy of insurance, and involved questions of intricacy and importance. The sum subscribed by the defendant was 1,000 dollars. Another cause on the same policy had been tried, and the jury were discharged, because they were unable to agree on a verdict.

Practice.
Struck jury

Riggs and P. W. Radcliff, contra.

Per Curiam.

Rule refused.(a)

(a) *Wright v. Columbian Ins. Co. (2 Johns. Rep. 211.)*

*MILLER and UNDERHILL against VAUGHAN.

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EVERTSON, in behalf of the plaintiffs, moved to set aside the report of referees, on affidavits. He was proceeding, when it appeared, in answer to an inquiry made by the court, that the cause had been referred by consent of the parties, and without any rule of court.

Where referees in a case are chosen by the parties without any rule of court, the court will not listen to an application to set aside the report. (b)

Per Curiam. Where a cause is referred by consent, the court will not listen to an application to set aside the report. We interpose only where the cause has been referred by a rule of court, pursuant to the statute. The parties are left to the same remedy as in the case of a mere submission to arbitrators. The court have no control over referees voluntarily chosen by the parties. It is also admitted, that this was not a proper case for a reference under the act. It was decided in *November term* last, that the court would not interfere in such a case.

(b) *Johnson v. Parmale, Johns. 128* 17

Motion denied.(c)

(c) See *Stevenson v. Becker*, post, 492.

ANONYMOUS.

IN the liquidation of a partial loss on the cargo, in an action on a policy of insurance, a question was raised for the

The jury have a discretion to allow interest on the amount Interest is not

of a partial loss on a policy of insurance, if, under all circumstances, they think it proper. Interest is not recoverable for unliquidated damages, or on uncertain demands. (d)

(d) See *Rensselaer Glass Factory v. Reid*, *Adm. 5 Con. Rep. 587*, and the cases there cited. S. C. 3 *Con. Rep.* 263, and the note.

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consideration of the court, whether *interest* was allowable on the account.

Per Curiam. The general rule is, that interest is not to be recovered on unliquidated damages, or for an uncertain demand. Jurors have, in many cases, a discretion to allow interest, by way of damages, according to the circumstances of the case; and this is a case in which that discretion may be exercised

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*MALCOLM *ads.* BAYARD.

Practice as to
giving notice of
arguments.

THE court decided, that either party might give notice to the other of bringing on the argument of a cause, *without waiting for a default on the other side*; and if the cases are not ready to be delivered to the judges, by the party whose right it is to make up the cases, when the cause is moved by the opposite party, he shall have judgment by default. (a)

(a) This is so far an alteration of the former practice. See *Coleman's Cases*, 13. *Hoyt & Bennet v. Campbell*.

BLAKE *against* MILLSPAUGH.

It is a good cause of challenge to a juror, that he has previously given his opinion on the question in controversy between the parties. (a) If the justice overrule the objection, and the party goes to trial on the merits, it is no waiver of the exception, nor does it preclude him from taking advantage of it in error.

THIS cause was on a *certiorari* from a justice's court. The present defendant brought an action against the present plaintiff, before a justice of the peace, for the penalty of twenty-five dollars, for taking excessive toll on the turnpike road, from *Newburgh*, to *Cochection*, contrary to the provisions of the act establishing the turnpike.†

On the jurors being called, the defendant below objected to one of them, alleging, as a cause of challenge, that the juror had previously expressed his opinion, that the toll so taken by the defendant was unlawful and not authorized by the act, and at the same time, offered to verify by proof, the truth of the exception; but the justice overruled the objection, and allowed the juror to be sworn. A verdict was found for the plaintiff, and a judgment given thereon for the debt and costs.

(a) *Ex parte Vermilyea*, 6 Cow. Rep. 563, and the cases cited.

† *Laws of N. Y.* vol. 2. p. 453. sess 24. c. 36.

Jones, for the plaintiff in error, contended, 1. That the exception taken to the juror was legal and valid. 2. That the toll-gatherer was not liable to be sued under the act for this penalty. He is a mere agent acting under the directions of the company, and is bound to take such tolls as they establish. He is liable only if he take more than the rate fixed by the di
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rectors, whose rules and orders he is obliged to obey. If the rate of toll given to him by the directors *is higher than what the law allows, the *Company* are the proper persons to be made responsible, not the defendant, who is an innocent agent, and answerable only for his own misconduct. The words of the act (sect. 13.) are "that if any toll-gatherer shall unreasonably delay or hinder any traveller or passenger at any of the gates, or shall demand and retain more toll than is established by the act, he shall for every such offence, forfeit and pay 25 dollars, to be recovered to the use of the person so unreasonably hindered or detained."

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In construing a penal act, the words ought to be taken in their strictest sense, and the offence alleged must be clearly within the terms of the law. Here the penalty is given to the person hindered or detained; but the plaintiff complained only of the defendant's taking more toll than was authorized by law, and not for being hindered or detained. 3. The section which declares the penalty and gives the right of action, is silent as to costs; yet the justice gave judgment for the costs.

[KENT, Ch. J. We have decided, that in all suits brought under the ten pound act, costs are given of course, where a debt or damages are recovered.]

Riggs, contra. Where an exception is made to a juror, it must be tried by *triors*; but in proceedings before a justice there can be no *triors*; he must decide on the exception himself. He has tried and decided on the exception, and that is conclusive; besides, having suffered this cause to go to the jury, and to be litigated before them, the defendant has thereby waived this exception, and cannot insist upon it as ground of error. But the exception made was not a valid one. The mere expression of an opinion by a juror, as to a question of law, is not a sufficient cause for disqualification; such a rule would be unreasonable and very inconvenient. Though the juror may have an opinion as to a matter of law, still it is to be presumed, that he will readily change that opinion, when instructed to the contrary by the court, whose duty it is to inform the jury on all points of law.

*As to the second objection, it may be said, that the words in the first part of the 13th section are in the disjunctive, hindering the traveller, or taking more toll than the law allows, and the penalty will attach to either offence. If he take excessive toll, the law makes him liable to the party injured; and if he has been misdirected, he must seek his remedy against his employers.

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Jones, in reply. The objection to the juror is, that he goes to the trial with a preconceived opinion and bias against the

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party, and cannot, therefore, deliberate and decide with that impartiality which is always expected in a jury. The juror, it is true, ought to receive the law as laid down by the court; but if he have formed preconceived notions, there is no certainty that he will follow the direction of the judge. If an exception be improperly repelled by the judge, it may always be taken advantage of in error. The defendant was compelled to go to trial with that jury; he had no election, and his proceeding under these circumstances cannot preclude him from availing himself, afterwards, of the misdirection of the judge.

Per Curiam. We think the challenge was well taken. That a juror had previously given an opinion on the very question in controversy, was a valid exception to his being sworn to try the cause; (a) the defendant's proceeding to trial on the merits, afterwards, is no waiver of the exception, nor does it preclude him from alleging the misdirection of the judge as error.

Judgment reversed.

(a) See *Roll. Abr.* 655. pl. 7, 8. 657. 2, 3. *Co. Litt.* 157. a. b.

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*HENDRICKS against B. C. & A. JUDAH.

In an action by an endorsee of a promissory note against the maker, the latter will not be allowed to prove a set-off against the original payee, unless he previously show that the note was transferred after it became due, or for the purpose of defrauding the maker of his set-off. (a)

THIS was an action of *assumpsit* on a promissory note, given by the defendants in *England*, to one *M. G. Waage*, resident there, for 223*l.* sterling, dated 28th September, 1803, payable to his order, on demand. The note was endorsed to one *Thomas Holmes*, and by him to the plaintiff. The defendants pleaded the general issue, and gave notice, under the statute, that the note, at the commencement of the suit, was the property of *Waage*, who was largely indebted to the defendants, which debt they intended to set off, and further, that the note was not endorsed by *Waage*, until after it became due, &c.

The cause was tried at the *New-York Sittings*, the 18th April, 1806, before Mr. Justice *Spencer*. The defendants read in evidence the deposition of *Holmes*, who deposed that he received the note of *Waage*, to collect the same for the account of a Mr. *Jacob Deleon*, of *Charleston*, to whose credit the money, when received, was to be passed. *Holmes* transmitted the note to the plaintiff, to collect of the defendants. The defendants offered further evidence, to show that the note really belonged to *Waage*, but this was overruled by the court, because the deposition of *Holmes* asserted the note to be the property of *Deleon*, and not of *Waage*, and the defendants must show that the note was endorsed to the plaintiff after it became due, before they could go into any evidence of a set-off.

(a) See *Comstock v. Hoag & Strong*, 5 *Wend. Rep.* 600. *Sica v. Cunningham*, 1 *Conn. Rep.* 397.

The jury found a verdict for the plaintiffs. The defendants' counsel now moved to set aside the verdict for the misdirection of the judge.

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Evertson, for defendants. The evidence offered by the defendants, to show that *Holmes* was used merely as a cover for *Waage's* interest in the note, and in order to let in the proof of a set-off, was proper, and ought not to have been overruled. Though the evidence was not strong and conclusive, still there was enough, when taken in connection with other circumstances, to raise a presumption of the fact, and it should have been left to the jury. The objection, as to the assertion in the deposition of *Holmes*, that the note belonged to *Deleon*, was not sufficient to arrest the other evidence, and prevent its going to the jury. However slight the evidence might have been, it might have had some weight with the jury, and if it was sufficient to have raised a doubt in their minds, the defendants might insist that it should be submitted to their deliberation. The judge might, if he had thought proper, have charged the jury that the evidence was slight, or entitled to no weight; still, like every other matter of fact, it ought to have been left to their consideration.

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A. Bleeker, contra, was stopped by the court.

Per Curiam. By the testimony of the defendants, it appears that the note had been *bona fide* transferred to a third person, to whom it belonged, and the suit is brought by the trustee of such third person. The note was payable on demand, and the suit brought within a year, so that it must have been transferred within that time. It may have been endorsed soon after its date, and as the transaction was in *England*, we may intend that to be the case, as no evidence to the contrary has been offered. The judge, therefore, was right in rejecting the proof offered by the defendants, as to a *set-off* against the demand of the original *payee*, until it had been proved that the note had been transferred for a fraudulent purpose, or at a *later period*, at least, than was to be presumed from the facts which appeared. (a)

Rule refused.

(a) See 2 *Caines*, 372. 1 *Johns. Rep.* 319. *Sandford v. Mickles & another*, (4 *Johns. Rep.* 221.) *O'Callaghan v. Sawyer*, (5 *Johns. Rep.* 118.)

The PEOPLE against R. B. CURLING.

THE prisoner was convicted at a court of *Oyer and Terminer*, in the city and county of New-York, in *January*, 1806, of *forgery*. The indictment contained four counts, on a forged

On an indictment for forging a check, drawn in the name of

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a copartnership firm, on the President and Directors of the Manhattan Company, it was held, that it was not necessary to set out the names of all the partners who composed the copartnership, or the banking company.

check on the *Manhattan Company*, signed "*Daniel Ludlow & Co.*" The first count charged the forgery to have been committed with an intent to defraud *Daniel Ludlow*, *and *Daniel Ludlow*, junior. The second count charged it to have been done with intent to defraud the *President and Directors of the Manhattan Company*. The fourth count charged the uttering of the check *scienter*, with intent to defraud *Daniel Ludlow*. On the return to the *certiorari*, directed to the Court of *Oyer and Terminer*, the counsel for the prisoner moved in arrest of judgment, on the following grounds:

1. Because, in the count charging the forgery with intent to defraud the drawers of the check, the name of *Ludlow Dashwood* was omitted; and in the count for uttering the same, with intent to defraud the drawers, the names of *Daniel Ludlow*, junior, and *Ludlow Dashwood*, were omitted.

2. The counts charging the forgery, and uttering of the check, with intent to defraud the *President and Directors of the Manhattan Company*, are not sufficiently certain and descriptive of the persons intended to be defrauded.

3. The act incorporating the *Manhattan Company* is a private act, and was not spread upon the record, nor given in evidence; and the court could not *judicially* take notice of any such company under that name.

Riker, District Attorney, for the people.

T. A. Emmet and *Blake*, for the prisoner.

Per Curiam. Though the forgery was of the copartnership name of *Daniel Ludlow & Co.*; it was not necessary to state an intention to defraud every individual of the company: the omission, therefore, of the name of one of the partners in one count, and of two of them in another, is not fatal. By our statute, forgery is complete, if it be done with intent to defraud any "*person*." Though an intention, therefore, may have existed to defraud every member of society through whose hands the check passed, nothing more was required than that any one person, thus intended to be defrauded, should be designated. An acquittal, on such an indictment, will always be a bar to another prosecution for the same forgery, though laid with intent to injure some other person. A different rule would often render it very difficult to draw a correct bill, from not knowing all the partners *of a house. This is a reasonable course, and safe for the prisoner. All he can require is, that the nature of his crime, and the name of his accuser, be set forth with sufficient certainty. Such was the opinion of the twelve judges, (*Lovell's case*, 1 *Leach*, 282.) in a case somewhat resembling this. What does the prisoner here complain of? He does not deny that he committed the offence with the intent laid in the indictment, but because it was de-

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signed to have had a still more extensive operation, he expects to be dismissed with impunity. The reason he assigns for our favorable interposition has nothing in it to excite much sympathy, and it would not be much to the honor of those who have devised the mode of proceeding in criminal cases, if we were bound to listen to it.

These two counts being good, it is unnecessary to dispose of any objections to the other, because, in criminal cases, one good count is sufficient to support a general verdict of guilty, however defective the others may be; for the reason, no doubt, that the prisoner has been convicted of the *whole matter* included in the good as well as bad counts. (*Grant v. Astle, Dougl. 730.*)

Motion denied, and judgment against the prisoner.

JACKSON, *ex dem.* LIVINGSTON, *against* BRYAN.

THIS was an action of ejectment, brought to recover the possession of a lot of land, distinguished by lot number seven, in class number three, of the house lots in lot number seven, in the subdivision of lot number twelve, in the sixteenth allotment of the *Kayaderosseras* patent.

The premises originally belonged to one *Low*, and after his attainder were sold, in 1786, by the commissioners of forfeitures, to *Henry Livingston*, under whom the lessor of the plaintiff proved his title. In 1775, *Low* permitted one *Norton* to occupy the premises, and promised to pay for the improvements if he chose to quit. *Norton* went away with the *British* army during the *American* war, and died. In 1783, his family returned, and his son took possession of the premises. In *April*, 1787, *Henry Livingston* gave permission to *Norton* to sell his improvements to one *Morgan*, *and that *Morgan* might take possession of the premises, and erect thereon such buildings as he thought proper. *Norton* accordingly sold his improvements, and transferred the possession to *Morgan*, who, in the same year, sold them to the present defendant for one hundred dollars. The permission given by *Henry Livingston* to *Morgan* was in writing, but contained no conditions, or any reservations as to rent. At the time the declaration in ejectment was served on the defendant, he admitted that he went on the land under the permission of *Henry Livingston*; but said, that having been in possession near thirty years, he meant to keep it; that the lessor of the plaintiff had, the last summer, offered to give him a lease, which he declined, as he thought his title as good as that of the lessor of the plaintiff.

The cause was tried at the circuit, at *Saratoga*, in *June*,
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A. entered upon the land of *B.* with his permission, as a mere occupant, and without any reservation of rent, and made improvements, which he sold to *C.*, who took possession. *B.* sold the land to *D.*, who brought an action of ejectment against *C.* It was held, that *C.*, after 18 years' possession, was

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to be considered as a tenant from year to year, and entitled to a notice to quit. (a)

(a) *Jackson v. Leachman*, 2 Johns. 75. *Jackson v. Dwyer*, 3 Johns. 422. *Jackson v. Green*, *Jackson v. Fuller*, 4 Johns. 185. 215. *Phillips v. Covert*, 7 Johns. 4. *Jackson v. Willsey*, 9 Johns. 267. *Jackson v. Egan*, 10 Johns. 335. *Jackson v. Aldrich*, 13 Johns.

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Kingale*, 17
Johns. 158. *Jack-
son v. Miller*, 7
Conn. Rep. 747.
*Jackson v. Mon-
crief*, 5 Wend.
Rep. 26.

1805, before Mr. Justice *Spencer*, who nonsuited the plaintiff, on the ground that the defendant was entitled to a notice to quit. A motion was made to set aside the nonsuit, and the case was submitted to the court without argument.

THOMPSON, J. The title of the lessor of the plaintiff to the premises in question, is not denied, and the only point raised for decision is, whether the defendant was entitled to notice to quit, prior to the commencement of the action. If the defendant is to be considered a tenant at will, it has been settled in this court, that notice to quit was not necessary; if he is to be regarded as a tenant from year to year, notice was requisite, unless he has done some act amounting to a forfeiture of this right. I am inclined to think, that the defendant can certainly be viewed in no more favorable light than as a tenant at will. He went into possession as a mere occupant, by permission of those under whom the plaintiff claims; *there was no time limited for the enjoyment, nor any rent reserved, nor has any ever been paid*; neither was there any stipulation to pay him for his improvements. *Henry Livingston*, under whom the lessor of the plaintiff claimed, had stipulated to pay *Gideon Morgan* (from whom the defendant got the possession) for his improvements. And it also appears, but from the defendant's own declarations *only, that *Henry Livingston* had given him (the defendant) permission to take off whatever he put on the land. But nothing appears to show, that the lessor of the plaintiff ever gave the defendant permission to occupy the premises, or made any promise to pay for his improvements. Under such circumstances, I should much question whether the defendant could be considered even a tenant at will. Admitting him to have stood in that relation to *Henry Livingston*, such relationship was destroyed by the conveyance to the lessor of the plaintiff. Courts, it is true, have latterly inclined against construing estates into tenancies at will. But such estates are recognized in our statute book, and must have been recognized by this court, in the decision that such tenants were not entitled to notice to quit. And if the defendant, in the present case, has any greater estate than a tenancy at will, I should be at a loss to determine what would be an estate at will, though it be said (3 Burr. 1609. *Timmins v. Rowlinson*) that leases at will, according to the strict legal notion of a lease at will, being in the country found extremely inconvenient, exist only notionally. "Yet," says Mr. *Hargrave*, (*Coke Litt.* 55. a. note 3.) "this observation means not that estates at will may not arise now as well as formerly, but only that it is no longer usual to create such estates by express words." (See, also, 3 Salk. 223. *Woodfall*, 188.) *De Grey*, Ch. J., says, (2 Black. Rep. 1173: *Roe v. Lees*.) "All leases for uncertain times are *prima facie* leases at will, and it is the reservation of an annual rent that turns them into leases from year to year. A general taking

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under another, without limitation of time, or reservation of an annual rent, can be no other than an estate at will." (2 *Sid.* 153. *Carthew*, 101.) There is nothing, in such cases, to afford an implication of the renovation of the lease, after the expiration of a former time, which seems to be the basis upon which the doctrine of tenancies from year to year rests. (1 *Term Rep.* 162 *Right v. Darby*. 4 *Com. Dig.* 60.)

But admitting the defendant to have been a tenant from year to year, I should think that he had forfeited his right to a notice to quit, by disclaiming to hold under his landlord. It appears that in the summer previous to the commencement *of the present suit, the lessor of the plaintiff offered to lease the premises to the defendant, but that the defendant told him he did not thank him for his offer; *that he had as good a title as he had.*

It also appears, that at the time the declaration in ejectment in this cause was served, the defendant, after some conversation with the witness about his improvements, declared that *he had been in possession more than thirty years*, and that he meant to keep it. This declaration was, in point of fact, untrue, for he had been there but about eighteen years, and it was setting up in himself a possessory title, in hostility to the right of the lessor of the plaintiff, who, upon the trial, he claimed to be his landlord. It is not denied, that these declarations of the defendant, if they had been made prior to the commencement of the suit against him, would have amounted to a forfeiture of his right to notice to quit. (*Bull. N. P.* 96.) I cannot discover how their being made after the commencement of the suit will make any difference. It is not the case of the landlord's *giving notice* to quit after the commencement of his suit, where notice was acknowledged to be necessary; but it was deriving testimony from the confession and declarations of the defendant, to show that he had set up a title in himself, which was at war with the one he claimed upon the trial, and thereby placed himself in a situation that did not require notice to quit. If the defendant be tenant to the lessor of the plaintiff, he is made so by operation of law, and not by any contract between the parties. There was nothing to prevent the defendant from setting up a title in himself, which he did by claiming to hold by virtue of thirty years' possession. His declarations were retrospective, and went to a denial that the relation of landlord and tenant ever existed between him and the lessor of the plaintiff, and that he intended to rely upon his adverse possession. That the confessions of a party were made after the commencement of the suit can be no objection to their admissibility in evidence against him. My opinion, therefore, is, that the nonsuit ought to be set aside, and a new trial awarded.

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not having given notice to quit. After the service of the declaration in ejectment, the defendant made declarations which may amount to a disclaimer of the title. But these declarations cannot aid the plaintiff. He ought to show a complete right to the possession, prior to the day of the demise and the institution of the suit. It appears that, in the summer before, the defendant had refused a lease from *John Livingston*, saying he had as good a title as he had. This evidence I did not, at the trial, nor do I now, think, evidence of a disclaimer, because the defendant entered under *Henry Livingston*, and it did not appear that he had any information of the transfer of his title to the lessor. When a party who is tenant has an indubitable right to notice, and it is sought to deprive him of it on the ground of disclaimer, he ought to be made conusant of the right of a third person demanding his possession. On the principle, therefore, that the defendant did not controvert *Henry Livingston's* title, and was a stranger to his alienee, I do not think that what he said was such a disclaimer as to be a waiver of notice to quit, if by law he was entitled to it. This presents the only remaining question, whether the estate of the defendant was a tenancy at will, or for years. In the year 1788, the defendant went into possession, under a permission given by *Henry Livingston*, with leave to erect such buildings as were convenient. After so long a possession, and under such circumstances, it cannot, I think, be doubted, that the tenancy would be from year to year. *Christian*, in his notes to *Blackstone's Commentaries*, (2 *Black. Com.* 147. 149.) says, "A lease at will is now considered a lease from year to year, which cannot be vacated without half a year's notice to quit," and he is supported by the text. (3 *Burr.* 1609.) Tenancies at will exist nominally, and good policy, as well as common justice, seems to demand, that a holding, for an indefinite period, should be construed a tenancy from year to year; that no sudden determination of the estate, by the caprice of the lessor, should immediately dispossess the tenant: and, more especially, when he is in possession, not as a trespasser, *but by right, that he should not, without the least notice, be subjected to the costs of a suit in ejectment. It is true, that the reservation of a yearly rent is one of the criteria by which to distinguish a tenancy from year to year; but, in good sense, the landlord's right to sue for use and occupation is equivalent to an express reservation of rent. I am still of opinion that the nonsuit was right, and that the plaintiff should take nothing by his motion.

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KENT, Ch. J., concurred.

TOMPKINS, J. I concur in the opinion that the plaintiff ought to be nonsuited. As the defendant held the premises by permission of the owner, without any agreement as to the tenure, and not for any limited period, or with the reservation

of rent, I am disposed to regard him as tenant at will merely. The question then occurs, whether such a tenant is entitled to notice of the determination of his landlord's will, before he can be subjected to an action of ejectment. If, in the determination of that question, principles of policy and justice are to have weight, such notice will be deemed indispensable; otherwise, an indigent tenant might, at the arbitrary discretion of a landlord, without a moment's warning, at an inclement season, and under circumstances of great embarrassment, be instantly deprived of a home, or submit to the costs of an action, ruinous to him. But upon the ground of authority I am inclined to think, that a tenant at will is entitled to a notice to quit. The case of *Parker, ex dem. Walker, v. Constable*, (3 *Wils.* 25.) where this point was expressly adjudicated in favor of the tenant, has not, as I can find, been overruled. In this case a notice of six months was deemed necessary. So where a parol lease for a longer term than three years is made, which the statute of frauds declares shall have no other or greater force and effect than a lease or estate at will, six months notice has been adjudged necessary. (*Doe, ex dem. Rigge, v. Bell*, 5 *Term Rep.* 471.) The same motives of civil convenience, which have induced courts, of late years, to construe estates at will into tenancies from year to year, operates *most strongly in favor of requiring a reasonable notice to a tenant, of the determination of the will of his landlord.

It is nowhere said that a notice is not necessary. Elementary writers concur in saying that notice of some kind is necessary, and the true rule to guide us is, that the notice must be reasonable. The period of six months appears to me to comport with that rule; and as I find that period adopted in some authorities, and not expressly negatived by any, my opinion is, that it ought to be adopted here.

LIVINGSTON, J., being related to the lessor of the plaintiff, gave no opinion.

Judgment of nonsuit. (a)

(a) *Jackson, ex dem. Van Alen, v. Rogers*, (1 *Johns. Cases*, 33.) *Jackson, ex dem. Benton, v. Laughhead*, (2 *Johns. Rep.* 75.) *Jackson, ex dem. Dill, v. Tyler*, (2 *Johns. Rep.* 444.) *Jackson, ex dem. Carr, v. Green*, (4 *Johns. Rep.* 186. 215. 5 *Johns. Rep.* 128.)

LEAH DE ST. CROIX, Widow, &c. against J. SANDS.

Same against JACKSON.

THESE were actions to recover dower. *P. W. Radcliff*, for the demandant, on the return of the *grand cape*, moved that the tenants should be called to save their defaults; that

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In an action of dower, *unde nihil habet*, the tenant must ap-

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pear and plead,
on the *quarto
die post*, in the
term in which
the summons is
returned, other-
wise his default
may be enter-
ed. (a) The
plea of non sum-
mons must be
verified by affi-
davit, before it
can be received,
and be put in on
the *quarto die
post*; or it will
be too late at
the next term.

(a) See *Allen
v. Smith*, 20
Johns. 477.

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† *Booth on Real
Actions*, p. 21.
24.

‡ *Laws*, vol. 1.
p. 357. sess. 24.
c. 90. s. 24.

§ *Real Actions*.
24.

final judgment should be entered up against them, and writs of seisin and inquiry be awarded.

D. B. Ogden, for the tenants, thereupon moved, that the defaults entered at the last term should be set aside; so that the tenants might now come in and plead. These being cross motions, the court said they would hear that of the tenants first.

It appeared that the writs of dower *unde nihil habet*, were returnable on the second *Tuesday of February* last, at which time the tenants neglected to appear, and a default was entered, and the *grand cape* issued. *Malcolm* had given notice to the demandant's attorney, of being concerned for the tenants; but had neglected to enter their appearance at *February* term.

Colden, on the same side. By the *English* practice, in the prosecution of writs of right, the tenant may come in at the return of the *grand cape*, and save his default, by casting his *essoins*, and on making his excuse, his appearance may be entered.† *Essoins* by our law are *abolished.‡ It would be an extremely rigorous practice to exclude the party from appearing, after a simple default, when, in ordinary suits, defaults are every day set aside upon affidavits.

Riggs, in reply. The affidavits read on the part of the tenants are insufficient. The notice given to the demandant's attorney was merely that they had retained an attorney; still they were bound to appear on the *quarto die post*, in *February* term. The object of the writ of *grand cape* is to give the tenant an opportunity of offering some legal excuse for not appearing. These legal excuses are fixed and specific; they are enumerated in *Booth*,§ such as want of summons, imprisonment, inundation, tempests, &c. Common excuses are not sufficient. In this case, no legal excuse whatever is shown.

It is merely a neglect which would not avail in a common suit; and in this action the tenants are entitled to no particular favor.

Colden then offered pleas of *non summons*.

P. W. Radcliff objected to receiving the pleas of *non summons*, as the parties had been summoned on the original writ, and their default entered.

[*KENT*, Ch. J. Cannot the tenant plead *non summons*?]

P. W. Radcliff. He can wage his law, for, though abolished in all other cases, it is expressly saved by the statute in that of *non summons* in real actions.|| But *wager of law* must be in person,¶ and a plea of *non summons*, like a plea in abatement, must be verified by affidavit.

|| *Laws of N.Y.*
vol. 1. p. 357.

¶ *Booth*, 24.

Colden. The tenant, in waging his law, upon *non summons*

must have eleven persons with him to swear they believe what the tenant swears to be true,† and we want a day given to us for that purpose.

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† Booth, 26

Riggs. The tenant must appear and make his oath on the *quarto die post*; and then a day may be given him to bring his *compurgators*. This being a dilatory plea, it must, according to the statute, be verified by affidavit, when offered to the court, and before it can be received.

Per Curiam. The tenant has shown nothing to the court to excuse his default. The plea cannot be received unless *verified by affidavit, and this should have been done on the *quarto die post*. The demandant must have the effect of her motion.

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Judgment for the demandant.

THE OVERSEERS OF THE POOR OF THE TOWN OF NEWBURGH *against* THE OVERSEERS OF THE POOR OF THE TOWN OF PLATTEKILL.

BY the return to the *certiorari* in this cause, directed to the General Sessions of the Peace for the county of *Orange*, it appeared, that an order had been made by two justices of the town of *Newburgh*, for the removal of one *Thomas Hart*, a pauper, from that place to the town of *Plattekill*; and that an appeal had been made from this order to the Court of General Sessions of the Peace, by whom it was quashed, with costs.

An order for the removal of a pauper was quashed by the sessions, because there was no evidence, nor any adjudication that the pauper had a settlement in, or last came from, the town to which he was ordered to be removed. On appeal, the order of the sessions was affirmed. The sessions may allow costs on appeals to them in such cases.

A few days before the order of removal was made, the *pauper* came to *Newburgh*, and staid a day or two, when he was sent by one of the overseers of *Newburgh* to *Shawungunk*, from whence he was immediately sent back by a *pass warrant* from two justices of that town, to *Newburgh*. He was then removed, by the order now in question, to *Plattekill*. About seven years before, he had resided at that town with his family. He left that place afterwards, and it did not appear that he had any permanent residence anywhere. The order of removal recited, that the pauper had no legal settlement at *Newburgh*, and had produced no certificate of a settlement elsewhere, and that he was likely to become chargeable, &c.; that the pauper being deranged in his mind, the justices, on the oaths of witnesses, and due proof made to them, *adjudge* the above facts to be true, and that the last place of residence of the pauper was at *Plattekill*; but they are unable to learn the place of his last legal settlement, &c.

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† *Burrow's Set-
tlement Cases*,
840. 2 *Boll's*
Poor Laws, 564.
*Rex v. Ring-
wood*.

‡ *Laws of N.Y.*
vol. 1. p. 573.
sess. 24 c. 184.
s. 20.

§ Page 576.

|| *King v.*
Gravesend, Co-
munis, 97.

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Fisk, for the plaintiffs in error. 1. This is not such an *order that an appeal will lie from it to the sessions.† It is a mere *pass* warrant, to send the pauper from town to town. Where a pauper is a mere vagrant or transient person, without any place of legal settlement, he is taken and sent from town to town, by such an order, but no appeal will lie upon it.

2. The quarter sessions awarded costs. The act allows costs only in cases where an appeal is made concerning the settlement‡ of a pauper. *Plattekill* was the place of his last residence, not of his settlement.

Riggs and Ross, for the defendants. By the 7th section of the act,§ any stranger, on just suspicion of being likely to become chargeable, may be removed. If his last place of legal settlement can be discovered, he is to be sent there; otherwise, to the place he last came from. In the first case, an express adjudication of the fact is required, and the order directs him to be delivered to the overseers of the town where the pauper had his last place of settlement, who are bound to receive such pauper under a penalty. In the other cases, the warrant is to deliver the person to the constable of the next town.

The order states that the pauper came last from *Plattekill*. The fact is, that he had been sent back from *Shawungunk*, and the overseers of *Newburgh* sent him again to *Plattekill*. The order was, therefore, irregular. Now, if an appeal will not lie, in such a case, to set the matter right, a pauper may be sent backwards and forwards, like a shuttlecock, without end. By the 17th section of the act, an appeal lies, in every case, where the party thinks himself aggrieved. There is no distinction of cases; the words are general. Where the expressions are so general and explicit, it is useless to refer to *British* adjudications in the acts. *Pass-orders* there stand on a different ground from what they do in this country; but even in *England* an appeal lies from such orders.|| The present order of removal is not in the form of an order for transportation; it is directed to the overseers of *Plattekill*, who were bound to receive the pauper under a penalty; and if the judgment of the sessions is reversed, **Plattekill* will be without remedy. If the overseers of *Newburgh* were unable to find out the pauper's last place of settlement, or to pursue the directions of the act, they ought to have kept him, and not have proceeded in this irregular manner.

Costs may be given in every case where an appeal lies. Every order of removal whatever, of a pauper, and every appeal, must relate to, and concern the settlement of such pauper. This is the fair construction of this section of the act, and the only one that can give it its proper effect, and make it harmonize with the other parts of the statute.

Jones, in reply. This was a mere *vagrant pass*, on which no appeal will lie; the proceedings of the sessions were, there-
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fore, *coram non judice*. The warrant to *pass* contains nothing on which any adjudication can be made, nor any ground on which to appeal.† There is no adjudication of a settlement; the mentioning the town where the pauper last resided, amounts to no more than saying he came last from that town. The overseers of *Plattekill*, therefore, should have sent him to the next town, in the manner prescribed by the act, in regard to those who have no place of legal settlement. The pass or order, it is true, directs the *overseers* of *Plattekill* to receive the pauper, but the act says it may be directed to the constable of the next town, or *otherwise*.

In the case of *The Overseers of Shawangunk* against *The Overseers of Mamakating*, decided at the last term,‡ the court did not consider any particular form necessary in these orders. At any rate, the informality was not sufficient ground for quashing this order, especially, when it is fairly to be inferred from the facts, that *Plattekill* was the pauper's last place of residence.

2. It is evident, from the cases which have been cited, that a *vagrant pass* has no relation to a settlement; and is, therefore, not within the provision of that part of the act which authorizes the sessions to award costs.

Per Curiam. The order was properly quashed by the sessions, for there was no evidence, nor any adjudication, *that the pauper had a legal settlement at, or came *last* from, *Plattekill*. By a liberal construction of the 20th section of the act, the sessions are authorized to allow costs in such cases. The order of the sessions must be affirmed, and the appellants must pay the costs of this appeal.

Order of the sessions affirmed with costs.

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† 2 *Botts*,
658.

‡ *Ante*, 54.

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MAXWELL against ROBINSON & HARTSHORNE.

THIS was an action on a policy of insurance, dated the 22d September, 1803, upon the schooner *Little Tom*, valued at 2,000 dollars, "on a voyage from *New-York* to *Barbadoes* and *market*, and at and from thence to *New-York*."

The cause was tried at the *New-York Sittings*, the 9th January, 1806, before Mr. Justice *Livingston*.

The vessel sailed on her voyage, and arrived at *Barbadoes* in safety, and not finding a market there, proceeded to *Santa Cruz*, after stopping at one or two other places, and finding no market. The greater part of the cargo was sold at *Santa Cruz*; but not being able to sell the residue, the vessel proceeded to *St. Thomas*, where the remainder of the outward

A policy of insurance contained the words "on a voyage from *New-York* to *Barbadoes*, and a market." It was held, that these words gave the insured liberty to go *bona fide*, from island to island in the *West Indies*, until he sold the whole of the cargo. He may sell a

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part at one island, and a part at another, until the whole is disposed of.

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cargo was sold, and after taking in a homeward cargo, she set sail for *New-York*. The vessel, having encountered very heavy gales of wind, was so shattered as to be obliged to put into *Norfolk* to refit; and the present action was brought to recover the amount of repairs.

The plaintiff offered *parol* evidence to prove, that according to the understanding of merchants and persons engaged in the *West-India* trade, the words in the policy, "to *Barbadoes* and a market," gave a liberty to go from island to island, in the *West Indies*, and to sell a part at each, until the whole was disposed of. The counsel for the defendants objected to this evidence; but the judge, considering the word "market," as one of doubtful signification, admitted the proof. Several merchants and *underwriters testified that these words had been used in policies for many years, and that they always understood, and believed, and that it was generally so received among the merchants trading to the *West Indies*, that they gave the liberty of going to all or any of the ports in the *West Indies*, and to touch and trade, until a market was found for all the cargo. Some of the witnesses, however, thought the liberty extended no further than to one port beyond that named in the policy, or at least, that after having sold a part of the cargo at one island, the insured could not proceed to another, and be protected by the policy. The jury found a verdict for the plaintiff.

A motion was now made to set aside the verdict, and for a new trial. 1. Because the *parol* evidence of the meaning of words in the policy was not admissible; 2. If it was admissible, it was insufficient.

D. B. Ogden, for defendants, was stopped by the court.

[*KENT*, Ch. J. It was decided in 1794, that the words used in the policy allowed the insured to go from port to port until he found a market for his whole cargo; but I do not recollect the name of the case at present.]

Harison, for the plaintiff. I do not recollect the case alluded to; but I shall contend that *ex vi termini*, these words give the liberty to go to all or any of the ports in the *West Indies*, until the whole cargo is sold. I should suppose, however, that it was peculiar to policies on voyages to the *West Indies*, in reference to this particular course of trade.

Per Curiam. By the words in the policy, to *Barbadoes* and a market, a vessel may *bona fide* go from island to island until her whole cargo is disposed of; but we do not mean to say that the same construction is to be given to a policy in any other trade than that to the *West Indies*.(a) Our opinion is, that the plaintiff is entitled to judgment.

Judgment for the plaintiff.

(a) See *Gilfert v. Hallett & Bowne*, (2 *Johns. Cases*, 299.)

*LUDLOW *against* the COLUMBIAN INSURANCE COMPANY.NEW-YORK,
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THIS was an action on a policy of insurance, dated the 18th of *January*, 1804, on goods valued at 860 dollars, on a voyage from *New-York* to *Newbern*, in *North Carolina*, on board the vessel, called the *Nantasket*.

The loss was thus stated in the declaration; "that the said vessel, on the first of *February*, 1804, when on her voyage, was, by and through the force and violence of the winds and waves and currents, and by the perils and dangers of the seas, forced and driven upon and against certain shoals and reefs, and by means thereof, the said goods laden on board of the said schooner, were then and there wetted, damaged and wholly spoiled, and became totally lost," &c.

The cause was tried at the *New-York* *Sittings*, on the 4th of *January*, 1806, before Mr. Justice *Livingston*.

The policy, abandonment, and interest were proved. The vessel sailed from *New-York* on the 20th of *January*, 1804, on her voyage to *Newbern*, and arrived off *Occacoke Bar*, on the afternoon of the 31st of *January*. A signal was made for a pilot, to conduct the vessel over the bar, which lies near the mouth of the inlet.

In the morning of the next day, a pilot came on board, who conducted the vessel over the bar, where, on account of the darkness of the night, they came to anchor. The anchor fouled, and dragged, and the vessel was driven, by the violence of the wind and current, on the reef, from which, by cutting the cable, she was got off, and was driven on the beach at *Occacoke* point. In drifting over the reef, the vessel lost her rudder and boat, and a great part of her sheathing. The master went to *Shell-Castle*, about six miles distance, to gain assistance and advice, and applied to the deputy-marshal of the district, of the name of *Wallace*, who refused, on account of the situation of the vessel, and state of the weather at that time, to furnish lighters *to take the goods out of her. After many ineffectual attempts to get the schooner off, the master, with the best advice he could obtain from the persons there, had the cargo unladen, on the second day of *February*, and advertised for sale at public auction, for the benefit of all concerned. The schooner was about fifty tons burthen, and when the goods were unladen, she had several feet of water in her hold, occasioned principally by the surf breaking over her as she lay. The master, after the first day, did not apply for lighters, nor endeavor to obtain another vessel to carry the goods to *Newbern*, though lighters might have been obtained. The vessel belonged to *Dewey* and *Stow*, who were also the consignees of the goods. *Stow* was on board of the vessel, and *Dewey* came from *Newbern* to *Occacoke*, and gave directions

Insurance on goods from *New-York* to *Newbern* in *N. Carolina*. The vessel stranded on *Occacoke* beach. Not being able to get her off immediately, the master, with the advice of persons there, concluded to break up the voyage. Two days after, the goods were landed, and ten days thereafter, sold at public auction. The consignees bought the goods; and the vessel, having been got off, proceeded with the goods to *Newbern*. They were not opened, but were sold by the package, and though one box appeared to be injured, there was no evidence of the extent of the damage. It was held, that the insured had no right to abandon for a total loss. To justify an abandonment

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in case of stranding, the goods must be deteriorated to half their value. The insured, in this case, were bound to send the goods to their place of destination, as the accident happened at the mouth of the harbor, and lighters might have been obtained to transport the goods.

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as to the sale of the vessel and cargo, which took place at public auction, on the 13th of *February*. *Dewey* and *Stow*, the owners of the vessel, attended and purchased most of the goods. One box was opened and appeared wet, but the goods were not taken out or examined, but were all sold by the package, without inspection. In consequence of a favorable wind, and high tide, the vessel was got off, and the goods purchased at auction were put on board and carried to *Newbern*. *Occacoke* is about eighty miles from *Newbern*, about six miles from *Portsmouth*, and the same distance from *Shell-Castle*. The vessel, in going up to *Newbern*, leaked, but was easily kept free by the pumps, and the cargo was not damaged. It appeared to be the practice to sell the cargoes of stranded vessels on the beach at *Occacoke*. Lighters may be obtained, at regular prices, at *Portsmouth* and *Shell-Castle*, to carry goods to *Newbern*, or to other places in the vicinity.

The jury, after going from the bar, returned into court, and asked the judge whether, if *Dewey* acted with good faith, but mistook the law, respecting his obligation to carry the goods to *Newbern*, after the accident, the defendants were liable. The judge said, that if the jury believed that *Dewey* acted with good faith, they ought to find for the plaintiff.

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*The jury found a verdict for the plaintiff, for 871 dollars and 83 cents.

A motion was now made to set aside the verdict, and for new trial.

Bogert, for the defendants. The declaration avers a total loss of the goods, by their being wet and spoiled; but the evidence does not support this averment. On the trial, the plaintiff gave no evidence whatever of a loss by sea-damage, but attempted merely to prove that the vessel was *stranded*, and *incapable* of transporting the goods to their place of destination. If it were intended to recover for a total loss, occasioned by sea-damage, it should have been proved that it amounted to more than 50 per cent. of the value of the goods. The cause of loss must be stated according to the truth of the case, and the party must support this averment by correspondent proofs.†

† *Marshall*, 593,
594. *Park*, 62,
63.

‡ *Marshall*, 416.
502

§ *Marshall*, 378.
499. 502. 503,
506

Mere stranding is not a sufficient ground to recover as for a total loss of cargo. It must be followed by a shipwreck, or the vessel be wholly disabled from proceeding on her voyage, before the insured can have a right to abandon.‡ Nor, if the goods be safe, can the assured abandon unless it is impracticable to carry them to their place of destination. It is the duty of the assured to find another vessel, if one can be obtained in a reasonable time.§ In the present case, the vessel was stranded at the mouth of the river, on which the very port of destination lay, at a short distance inland; and lighters were easily to be procured to carry the goods to *Newbern*.

The vessel, in fact, a few days after the accident, was got off, and did proceed to her port of destination, in a fit condition to carry the goods.

The goods laid eleven days without any survey of them having been made; and were, afterwards, purchased at auction by the consignee, and sent in the same vessel to Newbern. The proceedings relative to the sale, show a great want of good faith; and an attempt to recover of the defendants, under such circumstances of suspicion and gross mismanagement, ought not to be countenanced.

*The court stopped *Bogert*, and desired the counsel for the plaintiff to begin.

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Hopkins and *Brinckerhoff*. The averment of the loss is made in the usual manner, where it arises in consequence of *stranding*.† Where a total loss is averred, you may recover for a partial loss; and in cases of *stranding*, you may recover for a partial loss. The declaration states that the goods were wet, and there is proof that some were wet; and in this view the extent of damage is immaterial. The declaration and proofs do not vary.‡ The insured may abandon whenever any of the losses or perils mentioned in the policy happen.§ He is bound to make his election without delay, and to give notice to the insurer.|| When the abandonment is once made, the property remains afterwards at the risk of the insurers, and the master and consignee are considered as their agents.¶ It is not always easy to determine when *stranding* is such a loss as will justify an abandonment.

† *Marshall*, 595
719. *Park*, 398.

‡ *Marshall*, 593.
Park, 62.

§ *Marshall*, 482

¶ *Marshall*, 510.

¶ 2 *Caines*, 284.
United Ins.
Com. v. Robinson & Hartshorne, affirmed in error, *March*, 1806.

[*LIVINGSTON*, J. There can be no doubt, if the goods, in consequence of *stranding*, be deteriorated to more than half their value, that the insured may abandon.]

Stranding, with some loss or damage, is a cause for abandonment.†† The mere innavigability of the vessel is not always a ground of abandonment; but *shipwreck* is so, though in fact there is no loss of the goods. In this case, the innavigability arising from the *stranding*, and attended with some damage, is equivalent to a *shipwreck*, and affords an equally just cause for abandoning the property.

†† 2 *Emerigon*,
187, 188.

Whatever the master does, *bona fide*, though he mistake, is binding on the underwriters.‡‡ If all the facts be duly examined, it will appear that every thing in this case has been done with good faith, and that there is no ground for the imputation of fraud. In regard to the *stranding*, or accident itself, no fraud is pretended. The determination to break up the voyage, on that event, was made, after a deliberate consultation with the most respectable people at the place, and pursuant to their advice. If the opinion thus formed was incorrect in point of law, still it ought to be binding. Efforts were made, without effect, to get the vessel off. It was necessary

‡‡ *Marshall*,
408, 410

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to decide speedily, without waiting for the possible result The proceedings relative to the sale of the property, were conducted according to the uniform usage and custom of the place, in similar cases. It was made at the usual place, after a public notification of ten days, and under the direction of a public officer of the district; the goods were sold to the highest bidder. Selling goods by invoice or package, is a customary mode.

[SPENCER, J. The goods having been sold to the *consignee*, can they be considered as purchased by him in any other character than that of *consignee*, and for the use of the *consignor*?]

That the owners or consignees purchased the goods affords no objection. There is no principle of policy nor reason that prevents the consignee from bidding at a public auction. It was beneficial to all persons interested, as it tended to raise the price. As the continuation of the voyage depended on the condition of the vessel, not on that of the goods, it was unnecessary to open them before the day of sale. It was better to sell them by the package, than by the piece. In short, there is nothing, in the whole course of the business, but what was usual, proper, and most for the interest of those concerned.

Per Curiam. There was not sufficient proof, in this case, of a loss or deterioration of the goods to more than half their value, in order to entitle the plaintiff to recover for a total loss. The only evidence of any loss or damage, is the result of the sale of the goods at *Occacoke*, which ought not to be the criterion; since it was made without any previous survey of the goods, or any inspection or disclosure whatever, of the extent of the damage. Yet the consignee was present, and the goods were in safe keeping twelve days before the sale, so that they might have been thoroughly examined. The case is not free from suspicion of fraud, arising from the conduct of the consignee in forcing the sale of the goods, and becoming the purchaser of a great part of them, at an enormous discount. If it be alleged *that the loss was total in a technical sense, from the inability of the vessel to transport the goods to *Newbern*, the contrary is proved, for it appears that the consignee, who was the purchaser, had the goods transported, immediately after the sale, to *Newbern*, without any difficulty, where he sold them for his own benefit, but for how much does not appear. Carrying goods from the beach up to *Newbern*, by lighters, does not appear to be unusual or improper, and *Occacoke* bar may be considered as the mouth of the harbor. We are clearly of opinion, that the plaintiff has not made out a case of total loss, and that the verdict must be set aside, with costs to abide the event of the suit.

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New trial granted.

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v.
WARREN.WARING *against* WARREN.

THIS cause came before the court on a writ of *error*, from the *Common Pleas*, or Mayor's Court of the city of *New-York*.

An action of *trover*, for certain goods and chattels, had been prosecuted in the court below, by the defendant in error, against the plaintiff in error. The defendant below pleaded the general issue, and a verdict was found for the plaintiff. From the *bill of exceptions*, tendered by the defendant below, signed and sealed by the judge, the following facts appeared. On the trial, one *Gilbert*, who was a deputy sheriff, was sworn as a witness, and proved, that in 1798, by virtue of an execution, directed to the sheriff of the city and county of *New-York*, he took the goods and chattels of one *Stephen Nocus*, and sold them at auction, at which sale the plaintiff below became the purchaser of the goods, corresponding with the description of those claimed by the plaintiff, and which were specified in a paper produced by the witness. The witness or sheriff made a copy from the paper, which contained an account of the articles purchased by the plaintiff, and a receipt, which was *delivered to the plaintiff. The witness was then asked what were the contents of that paper. The defendant's counsel objected to the question, on the ground that the plaintiff ought to produce the paper itself, or show it to be lost. This objection was overruled by the court below, who permitted the witness to give evidence of what the paper contained. The goods in question were proved to have been in possession of *Mrs. Nocus*, who was the wife of *Stephen Nocus*, and the mother of the plaintiff below, from the time of sale, until she intermarried with the defendant. The plaintiff then offered to prove that *Mrs. Nocus*, previous to her marriage with the defendant, had repeatedly declared that the goods in question belonged to the plaintiff, and were not her own. This was objected to on the part of the defendant, but was admitted by the court. The defendant then offered to prove that *Mrs. Nocus* had, at other times, before and since her marriage with the defendant, acknowledged that the goods were her own property, and did not belong to the plaintiff; but this evidence was overruled by the court. It was also proved that the plaintiff, after purchasing the goods, delivered them to *Mrs. Nocus*, his mother, as a loan for her accommodation.

It appeared that *Mrs. Nocus* married the defendant in *December*, 1800, and the goods in question were soon after removed from her house to that of the defendant, where they have remained to the present time. The defendant's wife died in *June*, 1804, and the plaintiff below brought his suit the *October* following.

A party is not bound to produce a paper, unless the opposite party has given him notice for that purpose. The declarations of a tenant, or party in possession are never received in evidence in support of his title; *aliter*, if against the interest of the person making such declarations.

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The particular errors assigned were, 1. That the parol evidence of the written paper ought not to have been admitted; 2. The evidence of the declarations of Mrs. *Nocus*, made previous to her marriage, was improperly received; 3. The testimony offered by the defendant ought not to have been rejected.

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Woods, for the plaintiff in error. The witness referred to a paper, or written instrument, delivered to the plaintiff, and it must, therefore, be presumed to be in his *possession. The general rule on this subject is, that no parol evidence of a written deed or instrument, in existence, and in the power of the party, will ever be received, but the original must be produced. This rule cannot be dispensed with, unless the original is shown to have been lost, or in the hands of the adverse party, who has refused to produce it, on notice given him, for that purpose. The reason of the rule is too obvious to need any argument or illustration. The instrument is higher and better evidence, and by its production, further light might have been thrown on this case.

Mrs. *Nocus* was no party to the suit, but a third person, and the declarations of a third person can never be admitted as evidence against the party. Yet the court, after allowing the plaintiff to give evidence of her declarations at one time, refused to permit the defendant to give evidence of what she had declared at another. If what she said at one time was proper evidence, her declarations at another time, in relation to the same transaction, must be equally proper. At any rate, the evidence offered by the defendant was material, in order to show that the subsequent declarations of Mrs. *Nocus* contradicted those made by her at a former period, and thereby to diminish the credit which might be attached to them.

Evertson, contra. The paper mentioned by the witness, was, in fact, a mere memorandum of the sale, which he held in his hand to refresh his memory. The original was an inventory of the goods, taken by the witness previous to the sale, and which was before the court. The paper in question was an extract, or copy from that inventory, of such articles as were purchased by the plaintiff, with a mere receipt at the bottom. Why require the production of a copy, when the original was before the court?

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Mrs. *Nocus* had married *Waring*, who thus derived a title to the goods from her, and which he held adversely to *Warren*, from whom Mrs. *Nocus* derived her right. It is precisely the same as if the action was against Mrs. *Nocus*. In her declarations made prior to her marriage, she was disinterested in saying the property belonged to her son; but *subsequently, she must be considered as interested. The declarations of a party holding adversely, are never received to support the

title under which he claims; though they may be received, when against it. (2 Term Rep. 53. *Davies v. Pearce*. 1 *Es-pinasse's Cases*, 458. *Walker v. Broadstick*.)

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[SPENCER, J. In actions of ejectment that rule is constantly adopted.]

Per Curiam. It was not necessary to produce the paper. It was sufficient for the plaintiff to show that he had purchased the goods at auction. It was a paper with which the defendant had nothing to do, and which the plaintiff was not bound to produce. If the defendant wished it, he ought to have taken the proper steps for that purpose, by giving notice to the opposite party to produce it, or that *parol evidence* would be given of its contents. The objection was properly overruled. The court below were also right in rejecting the evidence offered by the defendant, of the declarations of Mrs. *Nocus* made subsequently to her marriage, for she was then interested to maintain her own possession, and to support her title.

Judgment affirmed.(a)

(a) See 2 *Day's Rep.* 338. *Young v. Vredenberg*, ante, 159. *Kenny v. Clarkson* and *Vanhorne*, post, 385. *Jackson*, ex dem. *Griswold*, v. *Bard*, (4 *Johns. Rep.* 230.)

THE PEOPLE *against* GAINE.

THIS was an action on a bond with a special condition, and reaches assigned, &c. The jury had assessed the damages to the full amount of the penalty. The question submitted to the court was, whether the plaintiffs were entitled to interest from the time of the verdict to the day of taxing the costs.

Woodworth, Attorney General, for the people.

Harison, for the defendant.

Per Curiam. In all cases where the defendant applies to set aside a verdict, and thereby delays the plaintiff, interest is awarded; provided the cause of action be such as to carry interest. In this case, there has been no delay created by the defendant, and the verdict is for the full amount of the penalty. Interest ought not, therefore, to be allowed.

Where damages are assessed by a jury to the full amount of the penalty of a bond, and judgment has not been delayed by the defendant, no interest is allowed. In all cases after verdict, where proceedings are stayed on application by the defendant, interest is allowed for the time judgment is delayed.

Rule refused.(a)

(a) See *Vredenberg v. Hallett & Bowne*, (1 *Johns. Cases*, 21.)

CASES

ARGUED AND DETERMINED

IN THE

Supreme Court of Judicature

OF THE

STATE OF NEW-YORK,

IN AUGUST TERM, IN THE THIRTY-FIRST YEAR OF OUR
INDEPENDENCE.

VAN DICK, *qui tam*, &c. against VAN BEUREN and
VOSBURGH.

In an action on the statute to prevent champerty and maintenance, for buying a pretended title, &c., it was held, that where the deed of the grantor, conveying such pretended title, describes generally all the right and title to the land in a particular patent without specifying the precise quantity or bounds, and the

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grantor has a legal title to, and possession of, a part, and a part is unoccupied, though another part of the same patent be in the actual occupation of one who claims and holds adversely to the grantor, yet taking such a deed is not main-

THIS was an action of *debt*, brought by the plaintiff *qui tam*, &c., to recover the penalty given by the 9th section of the "act to prevent and punish champerty and maintenance." (a) The declaration, after reciting the statute, states, that one *Maria Herkemer*, unjustly pretending a right and title to one undivided ninth part of sundry lots, pieces or parcels of land, &c., lying in the town of *Kinderhook*, in the county of *Columbia*, after the publishing of the said act, to wit, &c., on the first day of *February*, 1800, at, &c., bargained and sold to the defendants the same right and title to one undivided ninth part of the said lots, &c., of which, &c., neither she, the said *Maria Herkemer*, nor any, nor either of her ancestors, nor those by whom she claims the same, was or were in possession, nor of the reversion or remainder thereof, nor received the rents, &c., *nor were the said defendants, or either of them, in possession of the said lots at the time of the said bargain and sale, &c., all which the said defendants sufficiently knowing, took and accepted, &c., contrary to the form, &c. The plaintiff averred the value of the premises to be 3,000 dollars. The defendants pleaded *nil debent*. The cause was tried at the Circuit Court, in *Albany*, the 6th of *September*, 1800, before Mr. Justice *Radcliff*.

The following were the material facts proved at the trial.

(a) *Greenleaf's* edition of the *Laws of New-York*, vol. 2. p. 40. It is the 8th section of the act in the *Revised Laws*, vol. 1. p. 315.

The plaintiff and his brother had lived on *De Bruy's* patent, of which the lots mentioned form a part, ever since the year 1752. They had been in the undisturbed possession of the patent, and had built a farm-house, barn, &c. upon it, and had cleared in several parts about 120 acres, and exercised various acts of ownership over it. The plaintiff and another person took possession, about six years since, of No. 1, in the 7th allotment of the division of a part of the said patent, made in 1793, by enclosing it, and leased out parcels of the said lot.

The deed of *Maria Herkemer* to the defendants was dated the 8th of *February*, 1800, by which, in consideration of 375 dollars, she bargained, sold and released to them, as tenants in common, all her right, title, &c. to a certain parcel or right of land, belonging to her, in *De Bruy's* patent, and "comprehended within the lands possessed by the *Van Dyck* family, and as might be more fully seen by the will of *Stephanus Van Alen*, made the 17th of *May*, 1740." It was objected, that this description was variant from that contained in the declaration; but parol proof was admitted, though opposed, that subsequently to the deed, the defendants had declared that they claimed a ninth part of the said *Stephanus Van Alen's* right in *De Bruy's* patent, as well of all the lands possessed by the *Van Dycks*, as of the residue. Before the defendants made the purchase, they were informed by the plaintiff, that he and *Henry Van Dyck* claimed the whole share of *Stephanus Van Alen*, and the defendants were warned not to make the purchase. The defendants replied, that they were advised by counsel that they might purchase, *and that there was no dispute about it. One of the defendants had declared to two of the witnesses, that in case they lost the land, they were not to pay Mrs. *H.* any thing.

The defendants read in evidence the will of *Stephanus Van Alen*, dated the 17th of *May*, 1740, by which he devised all his lands, &c., in *De Bruy's* patent, to his three sons, equally, in fee, with a proviso, that they pay to his four daughters, and to his granddaughter *Maria*, each 12l. 10s., within six years after the death of his wife, on condition, that if they or either of them fail to pay the said sums, the said daughters and granddaughter shall each have in fee one eighth of all the lands bequeathed to the son in default. He further desired his sons, in case any of his daughters were inclined to purchase of them the lands in *De Bruy's* patent, for a living for herself and family, to let such daughter have it at the same price at which the sons had it.

Two of the sons died about 54 years ago, under age and without issue. *Maria Herkemer*, who was the granddaughter mentioned in the will, married, and her husband died about ten years ago. For many years before, and ever since the death of her husband, she has resided out of the state. The deed for her right in *De Bruy's* patent was executed in *Canada*, and the defendants gave their notes for the consideration

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nance; especially where the purchase was made by the bona fide advice of counsel, and there are other circumstances to show that there was no intention to purchase a pretended title.

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money. At the time of executing the deed, the defendants were allowed 45 dollars for the trouble of coming to *Canada*, and wished a greater allowance because they should expend a good deal of money at law in getting the land. Mrs. *H.* said she had a good right to the land, but the *Van Dycks*, being in possession, intended to keep her out. The plaintiffs claimed under the will of *Stephanus Van Alen*, and in right of their mother *Hyletje*, one of the daughters, all the lands in the patent; and they claimed to hold by a construction which gave them the whole. A grandson of *Stephanus Van Alen* and his heirs had cut wood on the undivided part of the patent for many years. About three years ago, *Isaac Van Alen*, who possessed a piece of land, laid out in one of the divisions of the patent, under *Maria Herkemer*, was requested by the plaintiff to give up *the possession, which he refused, as he meant to buy it. The plaintiff desired him not to do so, as he intended to go to the agent of *Maria Herkemer*, and buy it for himself. The plaintiff also asked one of the defendants if he would take 500*l.* for his bargain, which he refused. Fourteen years ago, a piece of land was held in the patent by a person as tenant to one who married a granddaughter of *Stephanus Van Alen*. It was further proved, that, in 1787, the plaintiff admitted the right of a daughter of *Stephanus Van Alen* and of *Maria Herkemer* to the lands in the patent.

In the year 1720, a division of part of the patent was made, and in 1752, another division of a part; and the residue was divided in 1793. The lots composing the old farm, possessed by the plaintiff and his brother, were laid out for them in 1752, and the residue of the lands in dispute were laid out in 1793, for the representatives of *Stephanus Van Alen*, except two lots laid out in 1720 and 1752, two thirds of which the plaintiff took possession of about ten years ago, and the residue has been more than thirty years past in the possession of the children of *Stephanus Van Alen*, the son of the testator.

The judge told the jury, that the possession of one tenant in common was the possession of the other, unless it appeared otherwise. That the plaintiff's possession having been so long, and he having received the rents solely for himself, was proof that he held in his own right, and adversely. That the plaintiff's case, according to the evidence, was complete; but if the jury thought, from the evidence of the plaintiff's declarations, that he meant to acknowledge the title of Mrs. *Herkemer*, and that he held for her, then they ought to find a verdict for the defendants, otherwise for the plaintiff. The jury found a verdict for the plaintiff for four hundred dollars.

There had been a former argument of the motion for a new trial, when the judges were equally divided in opinion. A change having taken place afterwards in the bench, it was agreed that the cause should be argued a second time.

On the second argument, *Williams* and *Hoffman* were for the defendants, and *Van Vechten* and *Van Ness* for the plaintiff.

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Williams, for the defendant. (a) The deed or contract must be truly and correctly stated in the declaration, and a variance between that and the proof will be fatal. On this point, there was no difference between an action on this and on any other penal statute. The same rules that were required in regard to the statute of usury, or any other penal statute, were applicable to this case. In cases upon such statutes, a variance between the date of the contract, as laid in the declaration, and the one proved, had been held fatal.† Here the declaration stated the conveyance to be on the first of *February*, and it appeared in evidence to be dated the 8th of *February*. As the measure of damage in this case depended on the value of the premises at the time of sale, the day was material.‡ The subject, or premises conveyed, ought also to be clearly and precisely laid in the declaration. If there be any uncertainty in this respect, parol proof cannot be admitted to alter or enlarge the grant, and thereby to increase the liability of the defendants. The parol evidence to explain what part the defendants claimed was inadmissible.

† *Cooper*, 671.
Carlisle v.
Trears. *Douglas*, 665. *Bristow* v. *Wright*. See also the note in the last edition, as to the cases since, and the distinction.

‡ *Cro. Car.* 232. *King and Barnes* v. *Hill and Windsor*. *Hawk.* c. 86. s. 11.

2. As to the title of the defendants. By the devise over in the will of *Stephanus Van Alen*, *Maria Herkemer* became entitled to a *ninth* part; and though it may be contended on the other side that the second clause in the will defeats the operation of the first, and that a trust was created which survived to *Cornelius*, and that a deed from him was to be presumed; yet from the terms of the will and the evidence, the inference was the reverse. There was no evidence of her paying any part of the legacy, and the presumption of law must be, that she entered under her own right to an undivided ninth part, to which she was entitled by the will, rather than under the operation of the second clause. All her acts, too, are evidence that she entered as a *tenant in common under the will*.

*3. To create a lawful impediment to her conveying, there must be either an *actual* or *presumptive* ouster: The co-tenants have never been turned out of possession, and the possession of *Hyletje*, one of the daughters, must be considered as a holding for the benefit of all the co-tenants.§ A bare entry on another, without *actual* expulsion, will not create a *disseisin*, so as to prevent the possession of one co-tenant from enuring to the benefit of the other.|| There can be no such thing as a parol *disseisin* by a mere adverse claim.¶ The court ought not to presume a fact, so as to subject the defendants to a penalty. It is the province of the jury to presume an *ouster*; here it was not left to them; and if the court

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§ 5 *Burr.* 2604.
Empson v.
Shackleton. S.
S. 2 *Bla.* 690.

¶ *Litt. sec.* 398
Salk. 246.

¶ *Cooper*, 701.
217. 1 *Burr.* 11th.

(a) The argument having been opened at a term prior to the commencement of these reports, I did not hear it. The substance is here given from some loose notes furnished by a friend.—Reporter.

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† 7 Term Rep.
386. 389. Doe
v Keen. Gilb.
Tenures, 28.

refuse a new trial on that presumption, they will take the question of fact from the decision of a jury. It is fairly to be inferred, from the facts in the case, that Mrs. *Herkemer* was under age when her aunt entered; if so, the entry would enure to her benefit.†

No *laches* can be imputed to Mrs. *Herkemer*, that she has not exercised her right within due time, for she has been out of the state, and during her absence her right would be saved.

‡ 6 Comyn's
Dig. Seizin, F.
2.

The actual possession of the *Van Dycks* has been confined to 120 acres, until within a few years, and at the time of the trial they were not in possession of more than 310 acres. Now Mrs. *Herkemer* could never be disseised of that part which the plaintiff has never possessed.‡ She could, therefore, legally convey her right to such part of the land as was not in actual adverse possession. The deed must be construed as intending to convey her right only to such part as was not possessed by the plaintiff. If a deed be susceptible of different interpretations, that ought to be adopted which will give it effect. If the parol evidence be rejected, there is no difficulty in giving this construction to the deed. To extend the title by construction or *parol evidence*, so as to make the grantor liable to a penalty, is unnecessary and unreasonable. The expression is general, and it is fair to refer it to what was actually possessed by her own tenant. If the deed be construed to extend to her rightful estate only, *then there can be no ground for this action. The reference to the will of *Stephanus Van Alen* shows merely that Mrs. *H.* intended no more than to convey her right and title to whatever she might lawfully claim under that will. Besides, the devise to Mrs. *H.* was a *lien* on the land, and the plaintiff took it with that lien, which may be a proper subject of conveyance, as in the case of mortgages and other liens.

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4. Another objection is, that the *scienter* was a material fact, which ought to have been left to the jury, and it was not submitted to their consideration.

Van Vechten and *Van Ness*, for the plaintiff. 1. The purchase is the basis of this action; the time is immaterial. The declaration states all material facts. The offence consists in purchasing land, the title to which the defendants *knew* was in dispute. If the objection had been made at the trial, it might have been obviated. It ought not to prevail here. The day need not be precisely laid, though it may be material to prove the day at the trial, in order to ascertain the damage. In case of bonds, notes, and other written contracts, where the paper is in the party's possession, the instrument must be truly and accurately set forth. In other cases, this is not required. The reason why the exact day must be proved as laid in the declaration, in cases of *usury*, is, because the offence is taking money for the forbearance from a

certain day to a certain day; the day is material, as there may be various contracts on different days, which would create distinct offences. Here there can never be another action for the same offence. The deed is merely evidence of the purchase. Because the date is different from that stated in the declaration, it does not follow that it is the true one, for it may have been antedated. But it is a sufficient answer to say that the plaintiff was a stranger to the deed, and ought to be excused for any inaccuracy as to its date.†

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† *Plowden*, 84,
85. *Dyer*, 14.

2. The deed was for the right of the grantor, without specifying the quantity of land; it therefore becomes necessary to resort to parol evidence of the quantity. The *value of the land could not be ascertained without showing the quantity, and that could be proved only by parol evidence. The *general description* in the deed rendered such proof necessary. If the quantity could not be ascertained by the deed, it must be proved *aliunde*. Can it be permitted that a party should intrench himself in general expressions, and evade the provisions of a highly beneficial statute, by using general words of description under which may be comprehended some trifling interest of the grantor that he might lawfully convey? If this be allowed, the act may always be eluded, and the oldest and best established titles to land be brought into litigation with impunity. The *purchase* being the *gist* of this action, the *quantum* was matter to enable the jury merely to ascertain the damages.‡ In another point of view, the evidence became necessary to repel an objection of the defendants, that the recovery was to be limited to the small quantity of land possessed by *Isaac Van Alen*.

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3. As it has been already decided by the court, that *Mrs. H. was not a tenant in common*, it is unnecessary to argue that point.§ It appears from the facts stated in the case, that *Hyelje* did make her election as to taking the land in lieu of the legacy. She and her children took possession of her share or portion.

† 1 *Plowden*,
81. 85. 1 *Dyer*,
74. 1 *Hawk.* c.
72. sec. 24.
As to the nature
of this action,
and the evidence
necessary to
support it, see
15 *Viner's Ab.*
171. *T. 2 Hawk.*
c. 86. p. 419.
7th ed.

4. It is objected that the recovery in this case is for more than the plaintiff was entitled to, as other persons possessed some shares which ought to have been deducted. Some of these had been transferred to the *Van Dycks*. The quantum to be recovered was a question for the jury, and if they have found a trifling sum too much or too little, their verdict ought not to be disturbed. It does not appear, however, but that they did make the proper deductions.

§ See 1 *Caines*,
84. *Van Dyck v.*
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5. The proof of *ouster* was strong and decisive. The opinion of the judge on that point was correct, and it was his duty to state it to the jury.||

|| See 1 *Caines*,
84.

6. The entry of the plaintiff would be effectual, though *Mrs. H.* were out of the state, or an infant. For the statute *merely saves the right of entry in the person, and it is not transferable. The saving is to the parties only, or their heirs, and not to their assigns. A *feme covert* may be disseised.¶

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¶ 1 *Leon*. 166.

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†Hawk. b. 1. c.
86. s. 14. 10
Coke, 48.

‡ 13 Viner. 59.
n. 13. Falt. Heb.
14. 3 Coke, 63.
Twine's case.
Cro. Eliz. 629.

7. The court cannot so construe or modify the deed as to make it relate to the possession of *Isaac Van Alen* only. In this way the statute, which is made to protect *tertenants*,† and in aid of the common law for the prevention of litigation and fraud, would be entirely defeated. In regard to this statute, it is not necessary that the deed should be good, or bad, *in toto*. It may be good in part, and void in part.‡ Though the deed, therefore, may be good as to a small part, still it is bad as to the residue, and that is sufficient to sustain the verdict.

8. Admitting the legacy to have been a *lien* on the land, which is very questionable, yet, as the money paid by the defendants was much more, it is evident that it was not their intention to buy a mere *lien*. At best, it was a *chose in action*, or conditional limitation, which was not assignable. Besides, admitting Mrs. H. had a right of entry for the non-payment of the legacy, still it was a *disputed* right, and so within the statute. But after fifty years have elapsed, the law will presume that the legacy was paid.

9. The application to counsel, so far from being an excuse to the defendants, shows that they knew the title was disputed, and that they only wanted the advice of counsel how they might evade the statute. The language of the deed, as well as the whole conduct of the defendants, manifest a contrivance to elude the penalty of this act. The *scienter* was clearly and indisputably proved, and the whole evidence in the cause was fairly left to the jury.

10. That the declaration is against the defendants *jointly*, is no objection. The plaintiff, being a stranger to the deed, is not bound to declare according to the exact rights of the parties.§ The declaration is for a joint purchase, and so was the fact. Where the offence is one *and single, and cannot be severed, an action will lie against two or more who join in committing it.||

§ 15 Viner, 176.
Hawk. b. 11. c.
86 s. 14.

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|| Cowper, 611.
Ker v. Clark.

Hoffman, in reply. The offence created by the act is not merely the taking of a deed. A contract or agreement for the purchase of the pretended title is equally an offence. It is not true, that if the plaintiff fail in the present action, the act will be evaded. An evasion of this *action*, and of the *act*, are different things.

This sort of action is not entitled to any particular favor and the plaintiff ought to be bound to the strict rules of pleading. He might have declared generally; he has chosen to declare on a bargain and sale, and to rest himself on a particular deed, the date and contents of which he has set forth. He was not bound to set them forth; but if he will undertake to do so, he must prove the deed exactly as stated. Where the opposite party is in possession of a deed, the plaintiff need not make a *profert*, but he ought to state that fact by way of excuse. The act renders the date of the deed material, and the

apparent date is, *prima facie*, the true day of delivery, unless the contrary be shown. If there were a difference, it should have been so stated in the declaration. The statute against *champerty* is entitled to no more favor than that against usury, or other penal statutes. In actions on such statutes, courts always hold the plaintiff to strict proof. Thus, in the case of *Wilson, qui tam, v. Gilbert*,† the declaration described the parish as *Saint Ethelbug*, and it being proved that its real name was *Saint Ethelburga*, the variance was held fatal. The plaintiff should have declared that the defendants purchased all the pretended right of Mrs. *Herkemer*, and then averred that she had no right, &c.‡ The *scienter* is the essence of the offence, and the subsequent declarations of the defendants are no evidence of a *scienter* as to the purchase of *one ninth*.

2. Mrs. *Herkemer* does not pretend to claim the *one ninth* as devised under the will, and the parol proof was inadmissible. It may be requisite, in order to ascertain *the damages, but parol proof can never be received to vary the construction and affect the operation of a solemn deed.

3. Again, here is an action against the defendants *jointly* for a *joint offence*, when the statute mentions only a several offence. Every man must be responsible for his own acts. The *scientia* of one man is not the *scientia* of another. Though two are joined, yet one is liable. The statute speaks of the offenders as *single* or *separate*; it uses the words *buyer* or *seller*, and the *buyer* or *taker* incurs the penalty. Separate actions might have been brought.§ The defendants are *tenants in common*, and are not liable for a joint penalty. Suppose that twenty individuals had purchased as many parcels of land, and had taken but one deed. If the action is brought against all, one might, on failure of the rest, be made liable for the whole.

4. The rule as to a deed, being void in part, and void *in toto*, does not apply to the present case. Where a deed on the face of it is void in part, it is void *in toto* as an annuity deed; but this is by statute. Deeds for the purpose of maintenance were void at common law, before the statute of *Henry VIII*. Deeds for *champerty*, &c. are not made void by the statute against *champerty*. They are void by common law as being *maintenance*. The case cited in *Twyne's case*, was that of a fraud against the statute of 5 *Elizabeth*. So that where a deed is to be made void by common law, it may stand as to such part as is not against the statute. Would this deed have been valid at common law? The possession of one tenant in common is the possession of all. Have the *Van Dycks*, in regard to the whole 1,200 acres, *ousted* or *disseised* Mrs. *Herkemer*? The ouster or disseisin must be actual and coextensive with the whole 1,200 acres, otherwise the plaintiff cannot claim by actual *ouster*. Disseisin was a crime at common law,|| and was not to be extended beyond the actual possession or improvement of the land. *The possession in such case is

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† 2 Bos. & Pull
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‡ 15 Vintr, 154
n. 27.

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§ Cooper, 610.

|| 3 Burr. 1732.
Hawk. c. 64. s.
3, 4.

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not constructive. Where the party is in actual possession under a *legal title*, it may be extended by construction; but where he has no legal title, there can be no constructive possession. Constructive possession is matter of law; actual possession is matter of fact. If the legal title to any part be in the defendants, they have the constructive possession of all the land not in the *actual* possession of the plaintiff who claims merely by possession. Until six or seven years since, no more than 120 acres were *actually* possessed by the *Van Dycks*. Such a possession can never deprive Mrs. *Herkemer* of her right to sell her legal estate. By her tenant *Isaac Van Alen*, Mrs. *Herkemer* was in actual possession of part of the land; her deed, therefore, will operate to convey so much at least. If the deed be valid so far, it is not within the statute. Why give land by construction to the plaintiff, rather than to Mrs. *Herkemer* who, being in possession of a part, under a legal title, has a fairer claim to have her possession extended by construction?

As the *scienter* constitutes the essence of the offence, it was the peculiar province of the jury to decide upon it. If the judge, by deciding on that fact, as well as on that of the *ouster* of Mrs. *Herkemer*, has withdrawn it from the consideration of the jury, the court ought to grant a new trial, that the jury may pronounce upon what is so material in this action.

THOMPSON, J. On the argument of the present motion, a great variety of questions have been presented to the consideration of the court. I shall, however, confine myself to one or two of them, which go most directly to the merits of the case, and which, in my judgment, are sufficient to warrant the granting of a new trial.

This action was brought against the defendants on a penal statute, for purchasing, as is alleged, the pretended right of *Maria Herkemer* in *De Bruy's* patent, and which she claimed under the will of *Stephanus Van Alen*. It becomes necessary, therefore, to inquire, whether Mrs. *Herkemer*, at the time she executed the deed in question, had any right or **title* to lands in *De Bruy's* patent which she could convey.

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[Here the judge stated the clauses in the will.]

It appears from the case, that as lately as the year 1799, the plaintiff said he was willing to pay Mrs. *Herkemer* the legacy given her by the will, which was equivalent to an acknowledgment that it never had been paid, and by the operation of the will, the title and right to one eighth of the land became vested in Mrs. *Herkemer*. It is said, however, that the plaintiff claimed title to the land under his mother, who was one of the daughters of *Stephanus Van Alen*, and under that clause in the will which it is contended gives to any of the daughters the right of electing to purchase the land. It is of but little importance, as it respects the present suit, under what title the plaintiff claims, or whether that title be valid or not, provided

the land was actually occupied, and the possession held adversely to Mrs. *Herkemer's* claim. But if Mrs. *Herkemer* was in possession, either by herself or her tenant, or if the lands were unoccupied, there can be no doubt the defendants have not incurred any penalty in purchasing.

That Mrs. *Herkemer* had possession of some land within *De Bruy's* patent, is not denied. *Isaac Van Alen* was a tenant under her, though the quantity of land occupied by him does not appear, but it was deemed of some importance by the plaintiff, because he expressed a wish to purchase it from Mrs. *Herkemer*, and declared his intention to apply to her agent for that purpose. Here was another recognition of Mrs. *Herkemer's* right in the patent. The deed given to the defendants would unquestionably vest in them Mrs. *Herkemer's* title and right to all the lands possessed by her tenant. But it is said the deed goes further, and includes lands in the possession of the *Van Dycks*. The description of the premises, as contained in the deed, was general, because Mrs. *Herkemer's* claim, under the will of *Stephanus Van Alen*, was that of an undivided right, and as a tenant in common with her co-devisees, as appears from the will. This will account for that part of the description which *speaks of land possessed by the *Van Dyck* family. If the *Van Dycks* had, by lapse of time, or otherwise, acquired an exclusive and adverse possession to a given portion of the lands of *Stephanus Van Alen* in this patent, so as to prevent the operations of the deed from Mrs. *Herkemer*, as to that part, this would not vitiate the deed with respect to the other lands where no such impediment existed. It cannot be pretended, that if A. should convey to B., by metes and bounds, 200 acres of land, and on a survey it should be ascertained, that 10 acres were held adversely by D., that the deed would be void as to the residue. The judgment of law, I apprehend, upon such a case, would be, to pronounce the deed inoperative as to the land held adversely, and good as to the residue. (13 *Vin.* 58.) The same rule of construction must be applied to the case before us. That the deed will be operative upon the land in possession of *Isaac Van Alen*, is indisputable. How much that was, is not shown. It may be equal to Mrs. *Herkemer's* right in the whole patent. But, from aught that appears, the deed will attach to a much greater quantity; for the right of *Stephanus Van Alen* in *De Bruy's* patent was 1,200 acres of land, and an adverse possession in the *Van Dycks* is shown only to about 430 acres; and it does not appear but that the residue may be unoccupied, and might be legally conveyed.

The circumstance of the defendants' having purchased under the *bona fide* advice of counsel, goes very far to remove any criminal intention from the transaction; and, in a doubtful case, is, I think, entitled to considerable weight, for the purpose of showing a want of the *scienter* required by the act, in order to subject a party to the penalty. It is true that the de-

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defendants were apprized that the plaintiff was in possession of a part of the land, but they also knew that Mrs. *Herkemer's* claim was only as a tenant in common; and they probably were informed by their counsel, that the possession of one tenant in common was the possession of all, and therefore Mrs. *Herkemer* was so far in possession, that she might legally convey even that occupied by the *Van Dycks*. The threats on the part of the *Van Dycks* to *prosecute the defendants if they purchased, are not entitled to much consideration; for they had good reason to conclude that those menaces originated from an extreme anxiety, on the part of the *Van Dycks*, to make the purchase themselves. Under these circumstances, I cannot think the defendants have subjected themselves to the penalty which has been recovered against them. My opinion, therefore, is, that a new trial ought to be granted, with costs to abide the event of the suit.

TOMPKINS, J., concurred.

KENT, Ch. J. Several grounds are taken in support of the motion :—

1. It is alleged that there is a fatal variance between the deed stated in the declaration, and the deed exhibited on the trial, as to the date and the description of the land. The deed produced bears date on the 8th of *January*, 1800, & the declaration states the bargain and sale to have been on 1st of *February* following. But the declaration does not undertake to say that the deed was dated on the 1st of *February* and does not in terms contradict it; for the sale may have been on the 1st of *February*, notwithstanding that the deed had an antecedent date. The two facts do not necessarily contradict each other, and it was not incumbent on the plaintiff to have stated precisely the date of the deed, nor its commencement, for he is presumed to be a stranger to it, and so it was held in the case of *Partridge v. Strange and Croker*, *Plowden*, 77. b. *Dyer*, 74. S. C. In respect to the description of the land, the deed was sufficiently set forth, and there is no absolute variance. The declaration states, that *Maria Herkemer* pretended a right to one ninth of sundry lots or parcels of land in *Kinderhook*, and sold the same; and this deed is for all her right and interest in and to a tract of land being in *De Bruy's* patent at *Kinderhook*, without stating precisely the amount of her right. All her right, as stated in the deed, may well be intended to apply to her claim to a ninth part, as stated in the declaration; and as the plaintiff was a stranger to the contract, *it was sufficient if he stated the substance. The gist of the action consisted in selling a pretended title. The amount of the right claimed was only matter of damages.

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2. The next objection is to the competency of parol proof of *Maria Herkemer's* claim to one ninth, as stated in the declaration. But this objection does not appear to me to be well.
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taken; for the testimony did not go to vary or extend the deed. The deed was for all her right, without specifying the extent or quantity of it, and the parol proof was to show what was the quantity. This proof was necessary for the purpose of estimating the value of the land sold by the deed. The jury, without this evidence, would not have had any rule for the assessment of damages. If this proof was to be excluded, a general conveyance of right, without mentioning the extent of it would completely elude the provisions of the statute.

3. But a more serious doubt is raised as to the illegality of the deed, because it was proved that *Maria Herkemer* was in possession, by her tenant, *Isaac Van Alen*, of some lands in *De Bruy's* patent, which had belonged to the estate of *Stephanus Van Alen*; and it is further urged, that, except as to the lands in the actual and adverse possession of the *Van Dycks*, an ouster of *Mrs. Herkemer*, as to the residue, was not to be presumed. As to the question whether *Mrs. Herkemer* was, or was not, to be adjudged out of possession at the time of the execution of her deed, of all the lands in *De Bruy's* patent, claimed under *Stephanus Van Alen*, the tenancy of *Isaac Van Alen* excepted, I had supposed it would not again have been agitated after the decisions of this court in *April* term, 1801, and *May* term, 1803, on the same question, in a controversy respecting the same deed, between *L. & H. Van Dyck and the defendants*. (1 *Caines*, 84.) It will be sufficient to observe, that, if the facts in this case are substantially the same with those in the former cases, I shall consider myself as bound by those decisions. I have carefully compared the facts, and there does not appear to *me to be any material difference, as far as they relate to the ouster of *Mrs. Herkemer*. It is stated in the present case, that the plaintiff and his brother claimed the lands in *De Bruy's* patent, under the will of *Stephanus Van Alen*, and in right of their mother *Hyletje*, and that, under that will, *they claimed all the lands in the patent* derived from *Stephanus Van Alen*, and that the lands *they held* were on a construction of the will that gave them *the whole*; that the share of *Stephanus Van Alen* amounted to 1,200 acres, chiefly pine land; that the plaintiff and his brother have lived on the land ever since the year 1752, claiming and using it as their own, and from time to time extending their improvements and enclosures, and that, for years antecedent to the date of the deed, they had 430 acres in different parcels in the patent under enclosure and occupation. These facts, in connection with the other facts, that *Maria Herkemer's* right accrued 54 years before the death of her uncles, and that she had been married at least 40 years before the date of the deed, and had never possessed or enjoyed any part of the lands in the patent, or the rents or profits thereof, except a small and recent possession taken under her by *Isaac Van Alen*, furnish, in my opinion, data equally strong with those in the former cases, to presume

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her ousted; and, under the authority of those decisions, that conclusion is now to be adopted.

With respect to the possession of her tenant, it was matter of evidence whether the general sale of all her right in the patent was intended to operate only upon the parcel of land possessed by *Van Alen*. The words of the deed are not so confined; she grants all her interest in that tract of land, in the patent now comprehended within the lands possessed by the *Van Dyck* family. This description, by the terms of it, refers not to *Isaac Van Alen's* lot, but to lands possessed by the *Van Dycks*, and the better construction is, that the possession of *Van Alen* did not pass. The suggestion that *Van Alen's* lot was surrounded by lands possessed by the *Van Dyck* family, does not appear to be warranted by the case; it is a forced and unnatural construction *of the meaning of the description; and if we resort to parol proof, it is clear that Mrs. *Herkemer* meant to convey, and the defendants to purchase, lands possessed and held adversely by the *Van Dyck* family. The words of the deed are susceptible of this definition and location, and if it were admitted that there was an ambiguity as to the lands intended, it is at least an *ambiguitas latens*, which is explainable by parol proof: That the deed was intended to convey a ninth of the *Van Dyck* possessions, was not disputed upon the trial. Its being limited to *Isaac Van Alen's* possession made no part of the defence, but the defendants set up, at the trial, the right of Mrs. *Herkemer*, under the will of her grandfather, to an undivided ninth part of his estate in the patent; and from the deed itself and their declarations, made before and after its execution, it was a clear and undoubted fact that they claimed under it the possession of the *Van Dycks*.

But admitting the deed to have embraced the possession of her tenant, and to have been so far valid, that will not affect the plaintiff's right of action. The statute cannot be eluded by fraudulently associating with a pretended title to one farm a valid one to another. As the statute has only superadded to the common law offence, the penalty of forfeiture of the value of the lands sold under the pretended title, it may perhaps be, that the deed is left to its operation at common law, by which it would be good as to one title and void as to the other.(a) Admitting the deed to receive this construction, it appears to me to be a point immaterial in the case. Whether the possession of *Van Alen* be or be not included in the deed, it was manifestly intended to embrace a ninth of the *Van Dyck* possessions, and is equally within the letter and spirit of the act. A party can never be admitted to defeat, or defy, the provisions of the statute by cunning and contrivance. Our

(a) See *Kenison v. Cole*, 8 East's Rep. 236, in the construction of the registry act that a deed might be void as to the transfer of the ship, it might be good for the payment of the money thereby intended to be secured; and see *Ley's Rep.* 79. *Mowat v. Leake* (8 Term Rep. 411.) But see 2 Evans's Pothier, App. p. 18.

manners and state of society have, no doubt, greatly diminished the terrors of this species of maintenance, but the mischiefs of the fraud accompanying such acts remain in full force. The policy of the act may change; but its construction cannot. The evil *intended to be prevented is described in elevated and solemn language, in the old books: "When many thought they had title or right unto any land, they, for the furtherance of their pretended right, conveyed their interest in some part thereof to great persons, and, with their countenance, did oppress the possessors." (1 *Leon.* 167.)

It was further objected, that the suit, being for a penalty, ought not to have been brought against the defendants, *jointly*, as they are not answerable for each other's intentions, and as they attempted to take as tenants in common. But this was a single offence, committed by a joint act, and the statute gave but one forfeiture or penalty. Nothing is more common than to join several defendants in one *qui tam* suit or information upon a penal statute, and the defendants, even in the action of debt, may plead *nil debent*, or not guilty, at their election, and they ought to sever in their pleas, if the nature of their defence require it. (*Hawk.* b. 2. c. 26. s. 66, 67, 68. *Bull. N. P.* 197.) The offence here was in its nature single, and the penalty consequently single; though the defendants united in committing it, it was still but one offence. (*Cowp.* 612.) The leading case under the statute of 32 *Hen. VIII.* c. 9, of which our act is a copy, is that of *Partridge, qui tam, &c., v. Strange and Croker*, and which is so fully and carefully reported in *Plowden*. That was a suit against two defendants for the like offence, and, notwithstanding a variety of objections were taken to the action, it appears that the one now under consideration wholly escaped the attention of the learned serjeants, who managed that cause, and I cannot but conclude that it must be deemed without foundation. The operation of the deed, upon the face of it, being to create an estate in common, makes no difference. The pretended title did not pass at all, but the criminal act was equally joint, as it was done by one and the same joint purchase. If, however, we were to allow weight to this objection, it is a sufficient answer to say, that it cannot arise, or be admitted under the present motion for a new trial. (a)

*If it were true that the *scienter* was not submitted to the jury, I should be very unwilling to uphold the verdict, but the case does not warrant that inference. The evidence of the intent of the party was full and complete. The act was committed after warning given, and was done upon the advice of counsel, which, though it might palliate, can never be permitted to justify an offence against the laws. When, therefore,

(a) In *Barnard v. Gortling*, in the Exchequer Chamber, (4 *Bos. & Pull.* 245.) in an action against two proctors, for acting as such without having obtained and entered a certificate according to the statute, brought by a common informer, to recover the penalty, it was held that two proctors could not be sued together for one offence.

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the judge told the jury, that the plaintiff's case, according to his evidence, was made out, he told them what was no more than palpable, as to the *quo animo* of the parties. In my opinion, therefore, the motion for a new trial ought to be denied.

LIVINGSTON, J., and SPENCER, J., having been counsel in the cause, gave no opinion.

New trial granted.

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B., the master of a ship, took on board some cochineal of C., at *New-Orleans*, to be delivered at *N. York*, and signed bills of lading, one of which he kept, accompanied with the customary proofs of neutral property, without which he refused to take the goods. During the voyage the

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ship was captured by the British. The captors took away all the papers relative to the ship and cargo, which were libelled as Spanish property. There were thirty different ship-pers of goods. B. put in a claim in behalf of the owners, and in his answer to the interrogatories, said that he had signed no bill of lading for the cochineal; that it belonged to P., who was a passenger, and had gone to *N. York*, after the capture; but he gave a particular account of

THIS was an action of *assumpsit*. The cause was tried at the *New-York* Sittings, the 11th day of *December*, 1804, before Mr. Justice *Livingston*. The agent of the plaintiff delivered to the defendant, who was master of the ship *Paulina*, at *New-Orleans*, three barrels of cochineal, the property of the plaintiff, to be delivered to him at *New-York*, &c., paying freight, &c. The defendant, on the 15th of *June*, 1799, signed four bills of lading, one of which he retained. The cochineal was stated to be shipped for the account and risk of the plaintiff, and to be delivered to him at *New-York*. An invoice of the cochineal, and proof of the ownership, made before the *American* vice-consul at *New-Orleans*, (there being no consul there,) with a consular certificate in the usual form, were delivered at the same time to the defendant, for the purpose of proving the property in case of necessity. The defendant refused to receive the cochineal, or to sign the bill of lading, until he was furnished with such proof of the property. The *Paulina* sailed from *New-Orleans* for *New-York*, the 18th *June*, and was captured the 16th *July*, by an *English* privateer, and sent to *New Providence*, where she arrived the 22d *July*. The captors seized the letter-bags and ship's papers, broke open the trunks in search of papers, and carried all they could find on board of the privateer. The *Paulina* and her cargo were libelled in the Vice-Admiralty Court, at *Nassau*, as *Spanish* property. The defendant put in an answer and claim, under oath, in which, after specifying the names of several shippers and consignees of the goods, he says, "that the three barrels of cochineal were put on board by a Mr. *James Freret*, and that the defendant was to deliver them to a Mr. *Pierce*, who was a passenger on board, and resided at *New-York*, and since the arrival of the *Paulina* at *Nassau*, had proceeded for that city. That the claimant did not sign any bill of lading therefor, and cannot take upon himself to say whose property they are, having merely received them into his state-room, and was to deliver them to the said passenger, who was to pay him a consideration therefor." It further appeared, from the admiralty pro-

ceedings at *Nassau*, that the defendant had answered various interrogatories, in which he mentioned the names of the passengers and various particulars concerning them and the goods on board, and of bills of lading; but said nothing of the cochineal, nor of any bill of lading therefor. The court acquitted the *Paulina* and the greater part of the cargo, being satisfied it was neutral property, and ordered further proof as to some shipments of money claimed as neutral, but condemned the three barrels of cochineal as lawful prize, being the only part of the cargo that was condemned. It appeared also that a commission to obtain further proof as to the property was sent to *New-York*, but nothing was done as to the cochineal.

*The declaration contained counts on the bill of lading for not delivering the cochineal, and a special count on the whole case. The defendant pleaded *non assumpsit*.

The judge charged the jury that it was a question of *good faith* between the parties, and that if they believed that the loss of the plaintiff's property had been occasioned by the fraud or design of the defendant, they ought to find a verdict for the plaintiff; but if they believed that the defendant was innocent of any fraudulent intent, and that the loss had happened through mere forgetfulness, mistake, or unintentional default on his part, they ought to find for the defendant. That as all his papers had been taken from him, it was to be presumed that the defendant had forgotten that he had signed the bills of lading. That it was the duty of the captors, according to the prize-act, to deposit all the papers with the register of the admiralty, where they might and ought to have been examined by the court. That if the papers relative to the cochineal were found in the register's office, they ought to have been considered as evidence in the cause, though not exhibited by either party. So that the misconduct or inattention of the defendant was not the cause of the loss of the property, but rather the misconduct of the captors or the court, in not depositing the papers in the admiralty, or in not referring to them. The jury found a verdict for the defendant. A motion was made to set aside the verdict as against evidence, and for the misdirection of the judge.

S. Jones, for the plaintiff. It is the duty of a master, in case of capture, shipwreck, or any other accident or event, to use his best exertions to protect and preserve the property intrusted to his care. To make him liable in case of loss, it is not necessary that his conduct should be fraudulent. He is considered as a carrier for *hire*, and answerable for ordinary neglect.† He is responsible for every injury and loss that may happen to the goods, and which might have been prevented by human foresight or care.‡ It is not a question merely of good faith, but of due diligence and care. Here was an express contract to protect the property; for the defendant

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the owners and consignees of the other goods. The only part of the cargo that was condemned, was the cochineal; the residue being either acquitted, or detained for

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further proof. In an action against B., for his negligence and misconduct, in not protecting the property of C. but giving a false account of it, in consequence of which it was condemned, it was held that he was not answerable, for it might be that he had forgotten that he had signed a bill of lading, and his answer did not justify the condemnation, so that it could not be said that he occasioned the loss; there being, besides, no evidence of fraud, or intentional neglect.

† *Jones's Law of Bailments*, 108. 121.

‡ *Abbott*, 196.

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refused to receive it until he was furnished with *necessary documents to prove its neutrality. Yet, in his answer before the Court of Admiralty, he deliberately swears that he never signed a bill of lading for the plaintiff's goods. He has thus violated his contract. It is no excuse for him to say that he had forgotten that he had signed any bill of lading, or that his papers were taken from him. In all cases of accident, independent of his special contract, the master is considered as the agent of the owner, and is bound to use due diligence and care. Here he has not only been remiss, negligent and inactive in the performance of his duty; but he has been active to the prejudice of the plaintiff. Had he told the simple truth, that he had forgotten whether he had signed the bill of lading or not, or who was the owner, and had referred to his papers in the hands of the captors, the property might have been liberated, or detained only for further proof. But he voluntarily swore to a fact not true, and thereby furnished the *very grounds* of condemnation; for the property is stated by the Court of Admiralty as without any proof whatever of its character, and under those suspicious circumstances, it could hardly escape condemnation. The plaintiff has suffered an injury, for which he has no remedy except against the defendant; and it is important and salutary that such agents should be held to a strict performance of their duty.

Hawes and Hoffman, for defendant. No authority has been cited for the position which has been advanced, that it is the duty of the master, in case of capture, to put in a claim of property. By the capture, which is a *peril of the sea*, the contract between the master and the consignee was at an end. If, before that event, he was answerable as a carrier for hire, for ordinary neglect; yet *after* the capture, he can be considered only as *common bailee*, and responsible merely for *gross neglect*, or a *breach of good faith*. This responsibility no longer arises out of the contract. What has been the conduct of the defendant in this case? The *Paulina* was a *general ship*, and there were above *thirty* different shippers of goods. All his papers were taken from him by the captors, and it is not to be presumed that he ever saw them afterwards. It may, therefore, well be supposed *that he had forgotten that he had signed a bill of lading for the cochineal, as well as the name of the consignee. There could certainly have been no intentional concealment of the truth; for he had no possible motive to commit fraud. He was bound to answer the interrogatories according to his best recollection and belief. If he has acted according to the best of his ability; if he has made the best use in his power of the faculties with which nature has endowed him, it is all that can be required of him. He has not been guilty of negligence. It was a defect of memory, a misfortune for which he is not answerable. Admitting that he ought to

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have inquired after, or referred to the papers in the hands of the captors, yet does it appear that the plaintiff has sustained any injury from his neglect to do so? To entitle the plaintiff to recover, it ought to be shown, not only that the defendant has been guilty of neglect, but that the plaintiff has suffered a damage in consequence of that neglect. Did the answer of the defendant afford any justifiable ground of condemnation to the Court of Admiralty? It was a case for further proof. If the defendant had said positively that it was the property of an enemy, it would have been a clear case for condemnation; but not when it is stated to belong to a particular person by name, and a resident in *New-York*. If the Admiralty Court illegally condemned the property, the plaintiff should have appealed from the sentence. The defendant cannot be responsible for their conduct.

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TOMPKINS, J., delivered the opinion of the court. The only question which it is material to determine in this cause, is, whether the jury ought to have been directed to inquire of, and decide upon, the negligence of the master. Fraud and design in the defendant were submitted to the jury, and their verdict ought to put at rest the question of good faith.

The duty of the defendant, as master, with regard to the protection of the goods, did not, in my opinion, cease with the capture. He ought, pursuant to his duty, to have contributed his exertions to rescue the property from condemnation, by interposing a claim, and exhibiting in support of it the documents with which he had been furnished for the protection of his cargo. If, by negligence in the performance *of this duty, the proprietor of the goods sustained damages, the master is, and ought to be, responsible to the extent of the amount of such damage.† In this instance, it is unnecessary to inquire whether the conduct of the master was imprudent or negligent, if the damages sustained did not result from his conduct. The disclosure he made was, undoubtedly, to the best of his recollection, correct, and he was deprived of the means of ascertaining the mistake. The statement relative to the cochineal, though erroneous, furnished to the court, before whom the proceedings were pending, no legal cause for condemnation. The condemnation of this part of the cargo, therefore, cannot be ascribed to the mistake of the master, but must have proceeded from some other cause. He, therefore, ought not to be responsible in damages for a mistake which, in contemplation of law, could have produced no injury to the plaintiff, and arose from a condemnation that must be presumed to have been founded on other reasons than those furnished by the facts stated by the master.

But, admitting the contrary position, I am not disposed to impute negligence to the defendant. Admit that he acted in good faith, and to the best recollection he had relative to the

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† *Jones's Law of Bailments*, 121

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property, which the verdict of the jury has established, I am of opinion no default or negligence is imputable to him. The owners of the cargo were numerous; the documents upon which he relied to establish the ownership were improperly withheld from him; and his sole dependence, as to the facts necessary to support the claim he had interposed, was on the accuracy of his memory. If this failed, in the peculiar situation in which he was placed, after exerting it in good faith, it would be severe to ascribe a failure in memory as to facts, for the correctness of which the recollection of the master was not relied upon, but written evidence furnished for the purpose, of which he was deprived, to any default or negligence in him. The opinion, therefore, of the court is, that the verdict ought to stand.

Judgment for the defendant

[* 370] *OGDEN & THOMAS, Assignees of W. & D. A. CUMMINGS, Bankrupts, against A. JACKSON.

C., being in insolvent circumstances, on the 14th November, 1803, assigned over a bill of lading of goods at sea to I., in trust for M., a bona fide creditor, provided, that in case M. sued him, then the property was to go to T. On the 14th of December, C. became a bankrupt, and his assignees brought an action of trover to recover the goods in the hands of I. It was held, that the assignment was a voluntary preference given to M., on the eve of and in contemplation of bankruptcy, and therefore void.

THIS was an action of trover. At the *New-York Sittings*, on the 15th of December, 1804, a verdict was taken for the plaintiffs, by consent of counsel, subject to the opinion of the court on the following case:—

W. & D. A. Cummings, the bankrupts, in the month of August, 1803, before any act of bankruptcy had been committed by them, shipped a quantity of rice and other articles to their correspondents at *Cape François*, for sale and returns. On the 14th of November, 1803, they assigned the original bill of lading, and invoice of the goods so shipped, by endorsing the same in the following words: "For a valuable consideration, we hereby assign over all our right, title and interest, of, in, and to the within invoice (bill of lading) to *Amasa Jackson*." These were delivered to the defendant with a letter, on the same day, in which they requested him to use his discretion as to insurance, &c., and after paying himself out of the proceeds, such expenses as may have necessarily accrued, to pay to the *Manhattan Company*, on their account, 720 dollars and 95 cents, or any part thereof which may be in his hands, and to pay over the balance to Mr. *Thomas Cummings*, of Georgia, on their account. In a postscript to this letter, the *Cummings* say, "Our account with the *Manhattan Company* is overdrawn 720 dollars and 95 cents; this is intended to secure them, let our business take what turn it may; unless they sue, and then you can pay the whole of the money to *Thomas Cummings*."

The defendant, under the assignment, received the return cargo, shipped the 17th November, 1803, which he had caused

to be insured, and for the net proceeds of which, remaining in his hands, this action was brought. The *Manhattan Company*, being informed of the assignment, *and upon the defendant's agreeing to pay them as soon as the proceeds came into his hands, redelivered some plate deposited with them as security, and which belonged to the wife of one of the bankrupts, having been settled on her by marriage articles. The bankrupts were indebted to *Thomas Cummings*, of *Georgia*, to a greater amount than the proceeds of the cargo assigned to the defendant. On the 14th *December*, 1803, a commission of bankruptcy issued against *W. & D. A. Cummings*, who were duly declared bankrupts, and on the 20th *February*, 1804, the plaintiffs were appointed assignees.

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Pendleton, for the defendant. The objections to the validity of this assignment must arise out of the law of bankruptcy; for if not void by that law, it must be considered as valid, it being regular, and in the usual mode of transferring property at sea. The decisions which have taken place on this subject require some evidence of fraudulent intention, or a contemplation of bankruptcy at the time of the transfer. The only evidence of such intention or view on the part of the bankrupt, was the simple fact that the assignment was made on the 14th *November*, 1803, and that the act of bankruptcy was on the day of *December*, after.

[*LIVINGSTON*, J. Are we not to presume that the jury did find that the assignment was made in contemplation of bankruptcy?]

The verdict was taken by consent, and with a view to bring the question before the court, whether the mere circumstance of an assignment to a particular creditor, while the party was insolvent, was sufficient to render such assignment void. A debtor who is insolvent may, in consequence of the pressure of a particular creditor, be induced to discharge the debt, or give security.† *Lord Mansfield* says, "A debtor may prefer a particular creditor, though he cannot assign over to him the whole of his estate, for that would be to defeat the bankrupt law. And the master of the rolls, in the case of *Small v. Oudley*,‡ observed, that a trader may be so circumstanced in regard *to some one creditor, that he honestly may, nay, ought to give him the preference.

* 2 *Burr.* 830
Wilson v. Day

† 2 *P. Wms.* 427
‡ *Burr.* 2239.

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That the notes of the *Cummings* were protested at the banks at the time, could not be considered as conclusive evidence of insolvency, so as to destroy the assignment. Where a creditor presses and threatens, and the debtor gives security, it is valid, though done on the very eve of bankruptcy.§

§ *Cullen's B.L.*
221.

Colden, for plaintiffs. As nothing appears to the contrary in the case, the court are to presume that the jury had evidence before them to support their verdict; for if the assignment was

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not made in contemplation of bankruptcy, it must have been considered as valid, and the plaintiffs would not have been entitled to a verdict. Though insolvency *per se*, may not be sufficient evidence of fraud, where there is an absolute assignment, yet, in the case of a conditional transfer, revocable by the party, it is otherwise. Here the assignment was conditional; the defendant was to pay over the proceeds to the bank, provided they did not sue; but in case they did, then the property was to go to *Thomas Cummings*. The defendant had no authority to make any agreement or arrangement with the *Manhattan Company*, but was to hold the property according to his trust. The bankrupts, or their assignees, might have revoked that trust, in case the *Manhattan Company* had thought proper to commence a suit against them. It is, in fact, a mere agreement to pay or assign over the property; there was no absolute transfer or actual delivery of it. But under what circumstances was this assignment made? It does not appear that the bankrupts were pressed by the *Manhattan Company*, nor was the assignment made to them in consequence of any threats; on the contrary, in case they sued, the property was to go to *Thomas Cummings*, another creditor, who, so far from pressing, must have been wholly ignorant of the circumstances of the bankrupts, and of the assignment thus intended for his benefit. It was, then, a mere voluntary act of the party, and, therefore, void as against the creditors in general.

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**Pendleton*, in reply. This case certainly comes before the court on a verdict taken by consent, though the counsel on the other side, having been very recently engaged in the cause, may not know the fact. The verdict was a mere matter of form, and it was agreed that no objection should be made to the form of action. It was intended to submit the single question, whether the bare fact of insolvency would invalidate a security given to a *bona fide* creditor. That there was no actual delivery of the property makes no difference; an order to pay out of a particular fund, or an agreement to assign, gives an equitable lien.† Nor does the circumstance of the transfer being revocable vary the nature of the case.

† *Atkins*, 162.
Brown v.
Heathcote. 1
Ves. jun. 220.
Yeates v.
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SPENCER, J., delivered the opinion of the court. From the manner in which this case is presented, we are unable to perceive that a jury has passed on the question, whether the assignment was made in contemplation of an act of bankruptcy, &c. and to give a preference to individual creditors.

I shall, therefore, now assume the question to be, whether the facts stated in the case were in point of law such as would warrant a jury in inferring the assignment to have been made with those views.

The defendant can be considered in no other light than a voluntary agent for the creditor, *T. Cummings*, with respect to whom it does not appear that he had urged the bankrupts for

security, or that he even knew of the assignment. Courts of law consider the property of the bankrupt completely at his disposal before an act of bankruptcy committed, so far as to protect a creditor in the receipt of money or the acquisition of goods, if done in the usual course of business; indeed, if money be obtained or security given when a bankruptcy is inevitable, and even contemplated by the bankrupt, such acts are valid if the effect of measures taken by the creditor. It will not, however, be permitted that a person, insolvent at the time, and contemplating an act of bankruptcy, should parcel out his estate to such creditors as *he* may see fit to prefer; this is opposed to the very genius of the bankrupt laws, which proceed upon a principle of equality and a just distribution.† It cannot be expected, in general, that any other evidence should be offered of the intention of the bankrupt in parting with his property, than circumstances clearly indicating an approaching bankruptcy, and that the transaction is out of the usual course of trade; and in this case the stopping of payment and insolvency are controlling circumstances. The language of the memorandum to the assignment, in addition to those facts, is proof of a contemplated bankruptcy; they say, "This is intended to secure them, let our business take what turn it may." If the cause rested solely on the circumstances of the *Cummings* at the time of the assignment, and the manner in which that took place, I should think a jury might well pronounce it to be fraudulent and void.

This case presents the most decided marks of a voluntary preference by the defendants, on the eve of a bankruptcy and in contemplation of it, to favored creditors, and this proof stands unexplained and uncontradicted by the bankrupts. Notwithstanding some loose cases upon this question, I am disposed to say, in the language of Lord *Mansfield*, that "it never entered into the mind of a judge, to say that a man in contemplation of an act of bankruptcy, could sit down and dispose of his effects to the use of different creditors."

I have not taken notice of the debt due to the bank, because they had a pledge for it; it is true, they gave it up on the defendant's undertaking to pay them out of the proceeds of the cargo, but that arrangement can have no bearing on this question. The plaintiffs must have judgment.

LIVINGSTON, J., gave no opinion.

Judgment for the plaintiffs.(a)

(a) *M'Menomy & Townsend v Ferrers*, (3 Johns. Rep. 71.) *Sands and others v. Codwise & others*, (4 Johns. Rep. 536.) *Phoenix v. Assignees of Ingraham*, (5 Johns. Rep. 412.)

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[*] 6 Term Rep. 10.
84. Bann. v. Freeland.
East, 117. 1802.
v. B. 12. 4 Term Rep. 212. Smith v. Hodson.
Coop. 122. 632.
Harman v. Fisher. Rust v. Cooper. 3 Wils. 47. Linton v. Bartlet. 4 Burr 2240. Alderson v. Temple

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*CLINTON and NORTON *against* HART.

THIS was an action of *debt*, on a bond with a special condition. The cause was tried before Mr. Justice *Livingston*, at the *New-York Sittings*, on the 3d *January*, 1805.

The defendant executed a bond to the plaintiffs, on the 2d *June*, 1797, for the penal sum of 3,520*l.* After reciting that the defendant had, for the consideration of 760*l.*, on the 2d *June*, 1797, conveyed by indenture a certain parcel of lands to the plaintiffs, and that by omissions and errors in the description of the premises contained in the title-deeds of the defendant, the deeds were defective and uncertain, so that it did not appear that he had any title to 3,520 acres, parcel of the premises, the *condition* of the bond declared, that if the defendant, within six months from the date thereof, should procure to be made a good and sufficient title in fee simple, &c. for the said 3,520 acres, to the plaintiffs, their heirs and assigns, &c., from all persons claiming any right or title to the premises, and free from encumbrances, &c., then the bond was to be void, &c.

H. executed a bond in a penal sum to *C. & N.*, conditioned to procure, within six months, certain conveyances to be executed and recorded, so as to perfect the title to certain lands conveyed by *H.* to *C. & N.* Two years after the bond had become forfeited, *H.* became insolvent, and obtained his discharge under the insolvent act. In an action brought against him afterwards, on this bond, it was held that it was a debt provable under the act, and that the insolvent was discharged from it.

The defendant pleaded *non est factum*, upon which issue was joined, and the plaintiffs, according to the statute, entered their suggestion upon the roll, that the bond was upon condition, which they set forth, and assigned the breaches that the defendant did not, within six months, &c., procure such a title, &c.

On the trial of the cause, the defendant offered in evidence his discharge under the insolvent act of this state. The counsel for the plaintiffs objected to the evidence, as the discharge could not bar their demand. The judge admitted the evidence, though he expressed an opinion that the certificate did not bar the demand of the plaintiffs. The discharge was in the usual form, and given on the 2d *November*, 1799.

It appeared in evidence, though objected to, that the defendant, when he applied for his discharge, did not represent *the demand of the plaintiffs among the debts due and owing by him; and that the debts of the petitioning creditors exceeded three fourths of the debts due by the defendant only 120 dollars.

The jury found a verdict for the plaintiffs, and assessed the damages on the breaches assigned, to 6,771 dollars and 33 cents, being the amount of the consideration money with interest.

On a case in which the above facts were stated, the defendant moved for a new trial. 1. Because the discharge under the insolvent act was a legal bar to the demand of the plaintiffs, and evidence to destroy the effect of that discharge was

improperly admitted; 2. That the rule of damages laid down by the judge, and adopted by the jury, was incorrect.

Evertson, for the defendant. Courts are always disposed, so far as is consistent with established principles, to include all debts within the insolvent's discharge. The present debt is certainly within the reason of the cases that have been decided on this point; the bond was forfeited two years before the defendant was discharged. If a bond be forfeited, though no damages be incurred or liquidated, the debt may be proved under the commission of bankruptcy; and if it can be proved, it is discharged by the certificate.† Lord *Kenyon* adopted the distinction of Lord *Hardwicke*, in the case *ex parte Groome*;‡ if a bond be forfeited at law, though in equity the money is not then payable, the court will avail itself of the debt at law, to protect the party who is in conscience entitled. Though the sum which the party ought to pay be *uncertain*, still, if there be a legal *remedy* before the bankruptcy happens, the debt may be proved under the commission.§ So in the case of a bail-bond forfeited, Lord *Mansfield* decided that though the party was liable for no more than the damages, yet there being a *debt due*, it was discharged by the bankrupt's certificate.|| So where a *bond* is given to replace stock at a particular day, if forfeited before the bankruptcy, the debt may be proved, though the rule of damages must be the price of stock on the day. In *case of a covenant of warranty in a deed, it has been already settled by this court, that the rule of damages is the consideration money and interest;¶ and the rule in the present case is precisely the same. The language of the insolvent law, and of the law relative to bankrupts, is the same in regard to what debts are to be discharged. The case of *Hatten v. Speyer*†† in this court, was a special action on the case for the misconduct of an agent, who had received money of his principal, to be laid out in a particular manner, and the principal and interest being considered as the clear rule of damages, the bankrupt was held to be discharged.

Sanford and *Harison*, for the plaintiffs. The only question is, whether the defendant is discharged from the debt. It is agreed on all hands, that if the debt could have been proved, it was discharged. To make a debt provable, it must be such a debt as the creditor can swear to. If the amount or real debt depend on extraneous circumstances of which the creditor is ignorant, he cannot make the affidavit. The petitioning creditors are required by the act, to make oath to the amount of the debts due to them. How can the party swear to a penalty? If he cannot make affidavit, he cannot prove his debt. The cases cited were those in which the party could prove a precise debt, by calculation, according to a settled rule. In regard to annuity bonds, stock to be delivered, &c., the *English* courts have settled rules of calculation, by which

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† 7 Term Rep.
97. 1 *Hodgson*
v. *Bell*.

‡ 1 *Atkyns*, 116.

§ 3 Term Rep.
564. *Utterson* v.
Vernon.

|| *Cooper*, 25
Golding v. *Bar-*
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¶ 3 *Cuines*, 111.
Stuats v. *Ter*
Eyck.

†† *Ante*, p. 37.

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† *Cullen*, 88.
110, 111.

† *Cullen*, 112.
and *note*. 1
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the amount can be ascertained. There is an established criterion, that cannot be varied by any acts of the party. In the case of *Hodgson v. Bell*, there was an indemnity bond for the precise sum due, and the creditor must have been able, from his own knowledge, to swear to the amount. It does not appear from the case of *Golding v. Barlow*, what was the nature of the original suit, whether debt, case, or tort; it must, however, as the party was held to bail, have been for a sum certain, since the creditor by the stat. of *George II.* is required to make affidavit of his debt, before he can hold the defendant to bail. In the case of *Hatten v. Speyer*, also, there was a sum certain, a clear rule of damages, the principal and interest due to the plaintiff. *To make a debt provable, it must be capable of being ascertained without the intervention of a jury. Trespass for *mesne profits*, or *trover*, cannot be proved before a verdict.† In cases of debts arising by forfeitures, a just distinction may be made between those which are securities *in effect*, for the principal and interest of a specific sum of money, and those for the performance of some collateral act, or the enjoyment of some collateral object. In the latter case, the *damage* actually sustained, and not the penalty, ought to be considered the real debt; if so, it could not be proved, unless ascertained before the bankruptcy.‡ There is no case to be found where a bond of indemnity, merely collateral, has been considered as provable. It is not the circumstance of a bond's being forfeited, that ought to make it provable, but the contract, or nature of the condition which has been broken. Here was a condition or contract, to perform a certain thing within six months. On the face of the bond there is no rule for calculating the damages. In an action, the amount of the damages would vary according to circumstances, or evidence of the defects in the conveyance. If the defect were trifling, or affected only a small part of the land, a jury would be justified in giving small damages in proportion. The court always look to the condition of the bond, to see if it affords an invariable rule, where the sum must be payable at all events, or whether it be variable and depending on intervening circumstances. In all cases there must be a rule and basis of calculation within the power and knowledge of the plaintiff. Suppose the defendant had, in fact, though unknown to the plaintiffs, procured the deeds to be executed and recorded, so as to perfect the title, they would be entitled only to nominal damages. It is, therefore, such a demand as requires the intervention of a jury. The rule taken by the jury in assessing the damages in this cause was correct, because the defendant offered no evidence to show that he had made good the title; it was the same as if there had been a failure of title. But it does not follow from this, that the rule was certain, and must exist at all events, unchangeable *by any circumstances which the defendant might have shown to the jury.

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Evertson, in reply. There is no dispute about principles. The difficulty is in their application. The decisions as to proving a penalty where the bond is forfeited, have in some degree differed; but the later adjudications are clear and positive: the case of *Hodgson v. Bell* is directly in point. But waiving the penalty, the contract or condition itself furnishes a rule for ascertaining the damages, which was adopted by the jury. As the condition was not performed, there was a failure of title, and the consideration money and interest then became the measure of damage, to the amount of which the plaintiffs might have sworn. The case for *mesne profits* is an action of *tort*, not of *contract*.

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LIVINGSTON, J., delivered the opinion of the court. We are of opinion that the bond being forfeited prior to the assignment, and the sum due being capable of liquidation by the party's own oath, this demand was barred by the discharge. For aught that appears, there was a total failure in the performance of the condition; and the consideration received by *Hart*, with interest, would, conformably to our decision in *Staats v. Executors of Ten Eyck*, (3 *Caines*, 111.) be the rule of damage. It does not appear, nor are we to suppose, that circumstances existed which might vary this rule, or lessen the damages. It is sufficient to see that here was, *prima facie*, a debt susceptible of an easy liquidation; if we look further, no demands whatever sounding in damages will be barred, because they may vary more or less according to circumstances; and thus every claim for goods sold, or for work and labor without an agreement as to price, would still be open against the insolvent, though it is well known that the law as to them is otherwise settled.

The omission to insert the plaintiffs as creditors in the inventory is not fatal by the act under which this discharge was obtained. (*Lester v. Thompson & White*, ante, p. 300.) By the last insolvent act, a *fraudulent* concealment of creditors renders a discharge void; but this provision not being in the former law, it is too late now to take advantage of it. There must be a new trial, with costs to abide the event.

New trial granted.

*HARRISON against M'INTOSH.

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THIS cause came before the court upon a *writ of error* from the Court of *Common Pleas* of the county of *Cayuga*.

The plaintiff in the court below stated in his *pleint* that the defendant, on the 26th *March*, 1804, in the house of the

In *replevin*, the avowant must set forth his title and allege the estate of which he is

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seised, or the avowry is bad. Plea of property in a stranger is good in bar or abatement, and entitles the party to a return, without an avowry. (a) If the plaintiff reply to such plea that the defendant entered the house in the night-time, it is bad. If the replication states that the goods were delivered to the plaintiff by B. for safe-keeping, and that the plaintiff has a special property in them, without stating that B. had any property, or authority to make the deposit, it is bad.

(a) See *Bemus v. Beckman*, 3 Wend. Rep. 667. 2 Wend. Rep. 645. *Wright v. Williams*, 5 Conn. Rep. 501.

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[Laws of N.Y. vol. 1. p. 134. sess. 11. c. 36.]

plaintiff, in the town of *Aurelius*, &c., took the goods and chattels of the plaintiff, &c., (being articles of household furniture enumerated,) and unjustly detained them against surety and pledges, &c.

The defendant pleaded, 1st. That the goods, &c. were the property of one *Edmund King*, and traversed that the property was in the plaintiff; 2d. That before the taking, to wit, on the day and year aforesaid, at the place aforesaid, the plaintiff, for the purpose of defrauding the defendant, and to prevent him from distraining the said goods, &c., for rent, &c., did wilfully aid and assist to carry away, from a certain messuage or dwelling-house in *Aurelius*, before that time let by the defendant as landlord to the said *Edmund King*, (leaving the rent of forty dollars due and unpaid,) the same goods, &c., which were liable to be distrained for the same rent, and did conceal them in the house of the plaintiff, to prevent, &c., and that the defendant, by virtue of the act concerning distresses, and for the better security and more easy recovery of rents, &c.† well acknowledges the taking the said goods, &c., as a distress for rent, &c.

The plaintiff replied to the first plea, (protesting that the property of the goods was in the plaintiff, &c.) that the defendant, in the night-time, on the day, &c., at, &c., did break and enter the plaintiff's house, &c., and take the said goods, &c., and concluded with a verification, &c. 2d. That before, &c. the said goods were delivered to the plaintiff by one *Timothy Brown*, safely and securely to keep, and that the plaintiff had a special property in them, &c., and tendered the general issue to the country. To the second plea, the plaintiff replied, 1st. That the forty dollars rent, at the time, &c., was not in arrear and unpaid, &c., and thereupon tendered an issue to the country; 2d. After protesting that he *did not knowingly and wilfully assist to take and carry away the goods, &c., or conceal them to prevent the distress, &c., he says that the defendant, in the night-time, at, &c., broke and entered the house of the plaintiff, and took the goods, &c., and this he was ready to verify, &c.

To these replications there were special demurrers by the defendant. The causes of demurrer to the first replication assigned were, 1. That the plaintiff neither confessed nor denied a material fact traversed by the defendant in his pleas, to wit, that the property of the goods was not in the plaintiff; 2. That the replication was a departure from the plea, and that the plaintiff ought to have taken issue on the traverse; 3. That he had introduced new matter totally immaterial and irrelevant, in determining the right of property, &c.; 4. That the issue on a material fact between the parties could not be joined on such a replication; 5. That the replication was insufficient, and wanted form, &c. The causes of demurrer to the second replication were, 1st. That the replication was a departure

from the plea, and issue ought to have been taken on the traverse; 2. That it did not appear by the replication what property, if any, the said *Brown* had in the goods; 3. That new matter was introduced, which concluded with an issue to the country instead of a verification; 4. That the replication was insufficient, and wanted form, &c.

The following causes of *demurrer* were assigned to the first replication to the second plea: 1. That in the first part of the replication, issue was taken on a fact not material; 2. That the plaintiff had taken issue that the *forty* dollars of rent were not in arrear and unpaid, but has not denied that there was a less sum due, &c.; 3. That the plea is insufficient, &c. As to the demurrer to the second replication to the second plea, the following causes were assigned: 1. That it does not deny the material allegations in the *avowry*, nor sufficiently answer them, but introduces new matter irrelevant, &c.; 2. That issue cannot be joined on any material fact; 3. That the replication is insufficient, and wants form, &c. To this there was a *joinder in demurrer* *on the part of the plaintiff. The court below considered the replications of the plaintiff insufficient, &c., and that the plea in bar to the *avowry* and *cognizance* were also insufficient, and they gave judgment that the plaintiff take nothing by his plaint and declaration; that the defendant go without day, &c., and have a return of his goods, &c., irrepleviable, &c., and awarded a writ of inquiry as to the damages, which were assessed at seven dollars, &c., with costs, &c.

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Hopkins, for the plaintiff in error. The pleadings on the part of the defendant are inartificial and informal.

1. The *avowry* is not well pleaded. It does not correspond with the act on which it is founded.† It admits a distress made off the premises; it ought, therefore, to have stated that it was done in the *day-time*, &c., in the manner prescribed by the act. The title of the *avowant* ought to be set forth fully and particularly. This is an indispensable rule in all *avowries*.‡

2. It must be admitted that plea of property in a stranger is a good plea; but the replication states that the distress was made in the *night-time*, and by breaking open the plaintiff's house. Every distress must be made in the *day-time*.§ An irregular distress can give no title. It is a perfect nullity, and, therefore, the party distraining is a trespasser. He has no right, therefore, to avail himself of a plea of property in a stranger. The *avowry* admits that the plaintiff was in possession, and the court may look to that part of the record in support of that fact. The power or right of replevin is not confined to the general property, or to the absolute owner; a person having a special property as a bailee, may maintain replevin.

† See 14th and
15th sections
vol. 1. p. 138

‡ 2 Salk. 561
Silly v. Dally.

§ Co Litt. 142. a
§ Bl. Com. 11.

Emott, for defendant. If either of the pleas, the *avowry*, or the property in a stranger, be good, the judgment must stand.

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It is essential that the plaintiff in replevin should have a right of property ; and it is always a good plea that the property is in another person. The replication does not answer or contradict the plea. It states only that the defendant broke open the house of the plaintiff in the night-time, and *took away the goods. This is no answer to the plea ; for it does not follow that, because the manner of taking was unlawful or irregular, the property was in the plaintiff. Admit this replication to be good, the real owner might afterwards bring his action, and the defendant could make no defence. If the defendant be a trespasser, the plaintiff has a remedy against him. It cannot affect the present question.

There are distinct replications, and each must stand or fall by itself. The facts contained in one replication cannot be adduced to supply the defects in another. If one be bad, it must be overruled, and the judgment must stand. The replication to the first plea is essentially bad, and though, on demurrer, every fact well pleaded is admitted, yet, if the plea be bad, nothing is admitted. The objections to the second replication are well taken. It sets up new matter, and concludes to the country, which is obviously an erroneous conclusion. Again the plaintiff should have taken issue on the fact of a right of property in a stranger. If he meant to rely on a special property in himself, he ought to have gone further, and have stated a right of property in *Brown*, and that it was delivered to the plaintiff, and remained for safe keeping at the time of the distress. For it might be that *Brown* had no property whatever in the goods, and so could transfer no special property to the plaintiff, or that the special property that once existed had ceased at the time of the distress. If the plaintiff in replevin cannot show a property in himself at the time, he must fail in his action.

Hopkins, in reply. In all cases where property is taken out of the possession of the party who has a right to retain it against third persons, either as *bailee* or otherwise, he may have an action of replevin to recover it back, unless prevented by some statute.† The replication states the special property, not by way of inference, but in direct terms ; that the goods were delivered to him by *Brown* for safe keeping, and that the plaintiff had a special property in them. There is some difference in the cases, as to the conclusion of such replications. But among the modern determinations, many *similar causes occur where the conclusion may be either by a verification, or to the country. In the case of *Baynham v. Matthews*,‡ Justice *Denison* observed, that if the plaintiff had replied without a traverse, he would have been right in concluding to the country ; but where you add a traverse, you must conclude with an averment. In the case of *Hedges v. Sandon*,§ the rule laid down in *Strange* is recognized, and it is admitted that the con-

† See *Gilbert's Law of Replevin*, p. 150.

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‡ 2 *Stra.* 871.

§ 2 *Term Rep.* 159.

elusion may be either way. The *general* rule is, that where the replication puts the whole substance of the plea in issue, it may conclude to the country, and there are many cases where the conclusion would be good either way. The plaintiff, having a special property, and intending to rely upon that fact, could not take issue on the fact of general property in a stranger. Had he done so, he must inevitably have failed.

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KENT, Ch. J., delivered the opinion of the court. The avowry in this case was clearly bad. It was necessary for the avowant to have set forth his title, and to allege the estate of which he was seized. The power of distress is called an extraordinary power, and for this reason the common law required the authority to be specifically shown. This old rule is still to be strictly enforced in cases not within the remedial revisions of certain statutes relative to pleadings in replevin. (*Yelv.* 148. 2 *Wils.* 261. 2 *Bos. & Pull.* 359. 2 *Saund.* 283, 284. c. n. 3. 310. 314. n. 13.) With respect to this point, we have no relaxation of the common law rule, as the provision in the statute of 11 *Geo.* II. c. 19. s. 22. has never been adopted.

But the plea of property in a stranger is a good plea, either in abatement or in bar, and entitles the party to a return without avowry, for the possession was illegally taken from him by the replevin. (2 *Lev.* 92. 1 *Salk.* 94.) The reply to this plea was insufficient and bad. The first reply was, that the defendant entered the house in the night-time and took the goods. This fact was altogether immaterial and irrelevant to the question of property, which the plea ought to have confessed and avoided, or traversed and denied. The second replication to this plea is also insufficient. It states, that the *goods were delivered to him by one *Brown*, to keep safely, but does not allege any property in *Brown*, nor any authority in him to deposit them. A deposit by a person having no property in the goods, and who might have come to the possession of them tortiously, could give the plaintiff no right to replevy them. And if the deposit had been made by the rightful owner, it is very questionable whether the plaintiff could have maintained a replevin for the taking, as the deposit was, from his own showing, a mere naked bailment for safe keeping, in which case the plaintiff could only be answerable for gross negligence in regard to his trust. Having no interest in the goods deposited, and not being responsible to the bailee for the taking, there can be no reason why he should have an action of trespass or replevin. But it is sufficient to observe in this case, that, for the reason first mentioned, the demurrer to this replication was well taken, and the judgment below properly rendered. If either plea be good, judgment must be given against

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the defendant, as it appears that he had no cause of action. The judgment below must, therefore, be affirmed.

Judgment affirmed. (a)

(a) See *Ex parte Chamberlain*, (1 Schoales & Lefroy's Reports, 320.) and *Shannon v. Shannon*, (1 Sch. & Lef. Rep. 324.) Lord Redesdale said, *Replevin* lies in any taking, and not merely upon a distress.

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K. purchased a British ship of merchants in Jamaica; but not being able to pay all the purchase-money, it was agreed that she should remain in the name of the original owners until the balance was paid, when they were to give a regular bill of sale. K. took possession of the vessel, and appeared as owner. In an action on a policy of insurance effected on the vessel in the name of K., it was held that he had an insurable interest. (a) The owner, notwithstanding there be a bottomry bond on the vessel, may insure his interest generally, though the holder of the bottomry bond must insure *eo nomine*. The common law of a foreign country may be proved by respectable and intelligent witnesses, but foreign statutes cannot be pro-

THIS was an action on a policy of insurance on the British sloop *Betsy*, the plaintiff, master, on a voyage at and from Charleston, S. C., to Jamaica, valued at 2,000 dollars, at a premium of seven per cent. The cause was tried at the New-York Sittings, the 11th of April, 1805, before Mr. *Justice Thompson, when the jury found a verdict for the plaintiff for a total loss. On a motion for a new trial, the following facts appeared in the case.

In December, 1799, the plaintiff purchased of Messrs. Douglas, Stewart & Minot, at Jamaica, the vessel insured by the defendants for the sum of 3,000 dollars, at which time he paid 1,800 dollars in part. No bill of sale was executed, but the vessel was delivered to the plaintiff, and an agreement, in writing, was entered into between him and Douglas, Stewart & Minot, by which it was agreed, that the vessel should continue in the names of the vendors, until the residue of the purchase-money was paid, when they promised to deliver to the plaintiff the register and a regular bill of sale. The plaintiff remained in possession of the vessel from the day of purchase until the time of the insurance and subsequent loss. During the voyage insured, the *Betsy* was captured by a French privateer, and carried into *Guadaloupe*, and there condemned as enemy's property. Depositions, taken under a commission, were introduced on the part of the defendants, to prove that, by the statutes of Great Britain, a British vessel could not be lawfully transferred from one British subject to another, so as to enjoy all the advantages of a British vessel, without a new register in the name of the purchaser.

The defendants' counsel moved for a nonsuit, which being overruled, they then called on the plaintiff to produce two papers under a notice for that purpose, one called a bottomry bond, and the other an affidavit of the plaintiff, which had been exhibited to the defendants among the preliminary proofs. These papers were delivered to the defendants' counsel, who, after examining them, declined reading them in evidence, upon which they were read by the plaintiff's counsel. The reading was objected to on the part of the defendants, but allowed by the judge. It appeared that the plaintiff, on the 24th of May,

(a) *M'Givney v. The Phoenix F. Ins. Company*, 1 Wend. Rep. 85.

1800, had executed an instrument of mortgage on the *Betsy* and her cargo, at *Charleston*, to Messrs. *A. and J. M. Clure* of that place, for 1,075 dollars and 15 cents, advanced by them for necessary repairs and expenses. The instrument contained a clause authorizing Messrs. *M. Clure* to get the vessel insured for 2,000 dollars, on account of the plaintiff, which they were to receive in case of the loss of the vessel; they accordingly had the insurance effected in *New-York*, in the name of the plaintiff, for that sum. It appeared, also, from the plaintiff's affidavit, that a prior insurance on the vessel had been made at *Kingston*, for 3,000 dollars, which had been paid, and that the vessel had cost the plaintiff seven thousand four hundred dollars, including repairs, which was said to be her value.

The judge, in his charge to the jury, was of opinion that the plaintiff had an insurable interest in the vessel; that, as between the assurer and assured, it was not essential that the transfer of the property should have been according to the forms of the *British* statutes; that the plaintiff, being the purchaser, and in possession, and having paid the consideration-money, had, at least, an equitable interest. But he left it to the jury to decide whether the plaintiff was in possession of the vessel, as master merely under the former owner, or as master and owner. He further stated that the right to insure was not taken away by the instrument of bottomry, which, however, was not technically a bottomry bond; that the plaintiff had an insurable interest beyond the amount of the bond; and that the value of the vessel was a question for the jury to determine; that, by the terms of the policy, all prior insurances were to be deducted, and the defendants having resorted to the plaintiff's affidavit, in order to show such prior assurance, the whole must be taken together; that, though the vessel cost 3,000 dollars, it did not appear what was her condition at the time of purchase, nor what repairs had been made, and she might have been worth much more at the time of insurance.

The points raised for the consideration of the court were, 1. That the plaintiff had not an *insurable interest*; *2. The interest intended to be insured was a *bottomry* interest, and ought to have been specified in the policy; 3. That the judge misapprehended the law in allowing the paper produced, on notice from the defendant, and not used by him, to be read in evidence, without proof. That the jury was misled by his not stating to them that they were not bound to believe the whole of the master's affidavit; 4. The verdict was against evidence, as there was no insurable interest beyond the prior insurance, and existing *liens* on the vessel.

Pendleton, for the defendants. This being a *British* vessel, the court must look to the laws of *Great Britain* relative to that species of property. It is one of those questions which are to be decided by the laws of a foreign country, whenever

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ed by parol. (a) It seems, that if one party give notice to the other to produce a paper at the trial which is called for and examined by him, that the party so calling for the paper is not bound to read it in evidence. The practice is analogous to a bill of discovery, where the answer is not evidence, but for the adverse party. Where a vessel was valued at 2,000 dollars, and insured for that sum, and there was a prior insurance for 3,000 dollars, the insured were allowed to prove that the vessel was worth enough to cover both policies.

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(a) *Packerd v. Hill*, 2 *Wend. Rep.* 411. *Chanoine v. Fowler*, 3 *Wend. Rep.* 173. *Church v. Hubbard*, 1 *Cranch*, 236. *Lincoln v. Batelle*, 6 *Wend. Rep.* 475.

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† 3 Term Rep.
407. *Rollston*
v. *Hibbert*. 3
Brown's C. C.
571. *Hibbert v.*
Rollston. 5
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derson.

they can be ascertained. To constitute an insurable interest, it must be such an interest as can be transferred to the insurer, so as to enable him to obtain the benefit of salvage. It will be said, however, that the plaintiff, by the agreement of purchase, had an equitable interest; but by the law of *Great Britain*, no transfer of any property whatever in a vessel can be made, unless by a bill of sale, pursuant to the registering act, as it is called. Every bill of sale, or instrument of transfer, must recite the register, otherwise it is absolutely null and void. The vendee has neither a title at law, nor in equity.† If, therefore, the rights of the plaintiff, in relation to the vessel, are to be decided according to the laws of *Great Britain*, it is clear that he had no insurable interest. By the registering act of the *United States*, if the vendor omit to recite the register in the bill of sale, it is not, therefore, void. The vessel is merely deprived of certain privileges in relation to the revenue. She remains subject to the duties paid by foreign ships. It may, perhaps, be said, that this is a matter of revenue, and that the court do not look to the revenue laws of foreign countries or enforce them. But this must be intended no further than that our courts will not lend their aid to the collection of the revenues of another country. The rule does not apply to questions of property. The plaintiff had no complete title, until he had paid all the consideration-money.

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2. It appears from the testimony that it was the intention of the plaintiff to make a bottomry; and that Messrs. *McClure* were directed to insure so as to cover the amount advanced. The nature of the interest ought to have been declared and specifically insured; and whether it were a bottomry or mortgage, if the party mean to insure it as such, the nature of the interest should have been specified in the policy. (a)

† 1 *Espinasse's*
Cases, 210.

§ 1 *Caines*, 277.

3. From the manner in which this instrument came before the jury, a general question arises, whether the party who has given notice to the other to produce a paper at the trial of a cause, is bound to read it when produced. In the case of *Sayer v. Kitchen*,‡ the defendant gave notice to the plaintiff to produce his books, and called for them at the trial. Lord *Kenny* said, that this did not make the books evidence to the jury, if the party who called for them did not choose to use them. The case of *Lawrence & Whitney* against *Van Horne & Clarkson*,§ though not decisive, bears some resemblance to this question. The party called for a paper pursuant to a notice to produce it; the other side objected to his inspecting it, unless he consented to read it in evidence, and the objection was thought sufficient. Again, where an instrument is called for and read, and part is in favor and part against the person introducing it, though the whole must go to the jury, they still

(a) See *Robertson & Brown v. The United Ins. Co.* (2 *Johns. Cases*, 250.) An insurance on a vessel will not cover a bottomry interest unless expressly mentioned in the policy. *Williams v. Smith*, (2 *Caines*, 19.)

must weigh the credit of it, and may believe or reject it, according as it is confirmed or disproved by other testimony.

4. The court cannot go beyond the policy to ascertain the value of the vessel. In the present policy she was valued at 2,000 dollars, and there was a prior insurance for 3,000 dollars. If the valuation be conclusive, extrinsic evidence cannot be resorted to for the purpose of proving a greater value. The property having been fully covered by the *prior insurance, according to the clause in the present policy, nothing was due to the plaintiff, and he ought to have been nonsuited at the trial.

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Evertson & Benson, for the plaintiff. 1. As the whole question is made to turn on the laws of *Great Britain*, in relation to the transfer of ships, it is necessary to inquire what evidence is now before the court of the existence of those laws. It is the testimony of a few merchants. But can the court admit the laws of a foreign country to be proved in this manner? It has been expressly decided by the *British* courts that foreign laws could not be proved by this kind of parol testimony.† If this evidence cannot be received, then the objection as to the provisions of *British* statutes is of no avail.

2. But the plaintiff had an *insurable interest*. Admitting the *British* act to be as stated, still the plaintiff might abandon and transfer his interest to the insurers, and the property would pass, though not with the character and privileges of a *British* ship; for it is begging the question to say the plaintiff could not abandon. Abandonment affords no criterion as to the right to insure.‡ The vessel, the hulk, the thing itself, belonged to the plaintiff, was in his possession, and could be transferred and delivered by him. But it is enough for the purposes of this action, if the plaintiff had an equitable interest. The courts of *Great Britain*, from reasons of just policy, may carry rigidly into effect all the laws relative to navigation and revenue; but this court, sitting here, and between these parties, is not bound by any motives or principles of that nature. The commercial and local regulations of a foreign country are never rigidly enforced. The *lex loci* is not applied to destroy a *bona fide* contract, though it may serve to modify it. The *British* statute is merely to confer privileges on *British* ships.§ A policy of insurance made in violation of the revenue laws of a foreign country will be supported; for no country pays any regard to the revenue laws of another.||

* A debt which arises in consequence of an article insured, and which would have given a *lien* on it, may be insured.¶ So a contingent and reasonable expectation of interest is sufficient to entitle the party to insure.†† The fact of possession by the plaintiff, with the other circumstances of ownership, is sufficient proof, without any written documents, to support this action.‡‡ In cases of insurance, it is not requisite to make

† 3 *Espinasse's Cases*, p. 58. *Boeltinck v. Schneider*.

‡ *Espinasse's Cases*, 75. *Hulle v. Heightman*, *Marshall*, 660.

§ 3 *Bos. & Pull.* 95. *Lucena v. Crouford*.

§ *Abbott*, 51. *Marshall*, 51. 53. 390. *Copper*, 343. *Ante*, p. 94. *Randall v. Rensselaer*.

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¶ *Marshall*, 218.

†† *Marshall*, 219.

‡‡ 4 *East*, 136, 137. *Robertson v. French*. 2 *Marshall*, 611.

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† 3 Bos. & Pul-
ler, 75. *Lucena*
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† Marshall,
651.

out a regular title with perfect exactness. It is not necessary that the plaintiff should have any beneficial interest; for a mere agent, trustee, or consignee may insure.† Putting out of view, therefore, the *British* statute, the plaintiff has a complete insurable interest. Besides, it may be observed, that, this being a *valued* policy, the same strict proof of interest is not required as if it were open.

3. It is objected that this was a bottomry interest, and ought to have been insured *specifically* as such. The instrument produced is not a bottomry bond;‡ but a mere mortgage. If the party will *fish* for proof, by calling for papers, they ought to be read in evidence. But if the paper be considered as not properly in evidence, then there is no proof whatever of any interest of that nature.

4. It does not appear that the other insurance was, in fact, prior to this policy; but if it were so, the sum inserted in the policy is not conclusive evidence of the value of the vessel. It is a mere valuation of the interest or portion which the party wishes to insure, and does not preclude proof that the vessel was of greater value.

Harison, in reply. 1. All property is the creature of the country to which it belongs, and no man can claim a title to it different from that which the laws of the country confer. This applies to personal, as well as to real property. The plaintiff declares himself to be the owner of a *British* vessel, and describes her as such. The obvious meaning of this description is, that he is the owner according to the laws of *Great Britain*. If, therefore, according *to those laws, he had no insurable interest, he ought not to recover here; for he is bound to prove his ownership according to his declaration; and the case shows that the laws of *Great Britain* were an object of inquiry. There is no injustice in deciding on this point according to the laws of that country. The plaintiff will be entitled to a return of premium. It is the same as if no contract had ever been made. Though evidence of the laws of a foreign country is not to be taken from any witness that may be picked up in the street, will it be said, that *documentary* evidence is indispensably requisite in every case, and that exemplifications of *British* acts of parliament must be obtained? If there be no documentary evidence, the best evidence that the nature of the case admits is sufficient. It is well known, that by Lord *Hawkesbury's* act, as it is called, every bill of sale of a *British* ship must recite the register, otherwise it is a perfect nullity: no property is transferred; and the purchaser may recover his money back. In the case of *Camden v. Anderson*,§ the arguments of the plaintiff's counsel were the same as those now urged in behalf of the present plaintiff: yet Lord *Kenyon* was of opinion, that since that act no title whatever, either

§ 5 Term Rep.
709.

legal or equitable, could be transferred by such an imperfect bill of sale.

It is true, that possession is *prima facie* evidence of property. But it is only presumptive evidence; and the rule is, *stabitur præsumptio donec probetur in contrarium*. This is not a mere *wagering* policy; but a real interest is represented to the defendants. Suppose the vessel taken by the *French*, and recaptured by the *British*, there would be a restitution on payment of salvage. To whom? To the original *British* owners. So that, on an abandonment in such a case, the assured would lose all the benefit of a restoration of the vessel. If the plaintiff could abandon no beneficial interest, ought he to be allowed to claim the benefit of a contract made under the appearance and representation of a transferable property? If the plaintiff had *disclosed the exact situation of the property, the contract would have been fair. A reference is not made to the laws of *Great Britain* to destroy the contract; but merely to show that there was no contract.

2. The evidence of the existence of a *bottomry*, independent of the paper produced, is as strong as that which existed in the case of *Robertson*, referred to in *Williams v. Smith*. Several witnesses speak of a *bottomry* bond, and it appears to have been endorsed on the register. The calling for the instrument did not make it evidence. If a party files a bill in chancery for a discovery, the defendant in his answer may set forth what is false, as well as what is true; and if he were bound to read the answer as evidence, his rights may be defeated by the act of the opposite party. He may offer it in evidence or not; but if he does produce it, the whole must be read. On account of the expense and delay attending bills of discovery, the practice of calling for papers has been introduced, and it ought to be governed by the same rules. It would be unreasonable and unjust to make a paper evidence, because it was called for. The most injurious consequences would result from such a rule of evidence. A party may be surprised by the paper produced. None of the cases go the length contended for by the other side.† Though, where a paper is produced and a part is read, the whole must be read; yet the jury are not bound to credit the whole; and, indeed, they ought to receive such evidence with great caution. The objection is, not that the judge was incorrect in leaving the whole to the jury, but that he ought to have added, they were not bound to believe the whole, otherwise they might suppose that they were precluded from examining into its truth.

3. The valuation of the vessel inserted in the policy is conclusive on the parties.‡ The practice is to insert the *real value*, though the whole is not insured. In case of loss, if the vessel had been worth 10,000 dollars, he could not have recovered more than 2,000 dollars. If the whole value, as now pretended, had been inserted, the defendants *would not, it is proba-

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† See *Peake's Law of Evidence*, c. 2. s. 4. p. 107. 109. 2 ed. 26.

‡ *Emuigon*, 215.

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ble, have underwritten. If the insurance at *Jamaica* was prior to the present policy, there can be nothing recovered here. That it was prior, is manifest from all the evidence in the case.

SPENCER, J., delivered the opinion of the court. It has been objected that, by the 25th Geo. III. c. 60. the certificate of registry not having been inserted, the bill of sale was utterly null and void. It has also been objected that the plaintiff having given a bottomry bond to *A. & J. M'Clure*, for 2,000 dollars, which sum they were authorized to get insured on the vessel, there was no insurable interest but the bottomry. With respect to the effect of the *British* statute, it is a sufficient answer to observe, that it has been proved only by *parol*; for though courts of law will receive evidence of the common law from intelligent persons of the country whose laws are to be proved, I think there exist strong reasons against such proof of foreign statutes, and this distinction, undoubtedly, prevails in the *English* courts.^(a) All the evidence in the case shows manifestly that the plaintiff had a reasonable and almost certain expectation of procuring all the muniments necessary to give him a title even under the *British* statute; he had paid nearly two thirds of the amount of the purchase-money, he had the full dominion of the vessel, and, according to the cases of *Le Cras v. Hughes*, and *Grant v. Parkinson*, (*Marshall*, 84. 111. 219.) his interest, independent of the question arising on the bottomry, was insurable.

That a bottomry interest cannot be insured but *eo nomine*, has been decided in this court; ^(b) the *M'Clures*, therefore, could not have been otherwise insured. The case of *Williams v. Smith* (2 *Caines*, 14.) is directly against the objection raised here. In that case a vessel was insured after being bottomed, and it was holden that the bottomry did not take away the right to effect an insurance for the owner. The circumstance of ignorance in *Williams* of the giving the bottomry when the insurance was effected, could have had no influence on the question. The plaintiff, then, in my judgment, had an insurable interest.

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*The opinion I have already expressed on the bottomry, renders it unnecessary to examine the second objection; because I have gone on the principle that there was a bottomry, when, if the paper read by the plaintiff without proof, were evidence, there appears to have been none. I must not, however, be understood as sanctioning the course adopted at the trial, in admitting the paper to be read without proof, because notice had been given to produce it, and it had been called for and perused. The case of *Lawrence & Whitney v. Van Horne & Clarkson* (1 *Caines*, 276.) settles nothing; the ther

(a) *Delafeld v. Hand*, (3 *Johns. Rep.* 310.) *Henry v. Adey*, (13 *East*, 221.)

(b) *Robertson & Brown v. The United Ins. Co.* (2 *Johns. Cases*, 256.)

chief justice expressing no decided opinion on the question, and the rest of the court were equally divided. It appears to me that the notice to produce a paper, and calling for its inspection, ought to be considered as analogous to a bill for discovery, where most certainly the answer is not evidence but for the adverse party. (a) I think it our duty to adopt such a course as will not needlessly drive parties into equity for discovery; I mention thus much, that we may not be misunderstood on this point of practice.

I can perceive no impropriety in the judge's charge in saying, "As the defendants, for the purpose of showing such prior insurances, have resorted to the plaintiff's affidavit, the whole of it must be taken together." The soundness of that position has not been controverted; but the counsel suppose that it ought to have been also observed, that the jury were not bound to believe that part of it which stated that the vessel, when she sailed on the voyage insured, was worth, and had cost 7,000 dollars. If verdicts were to be set aside because the judge, in delivering a charge, omitted comments which might have been proper, there are but few verdicts that would stand the test. It is difficult to believe that the jury could have understood the judge, that they were to believe every part of the affidavit; but that they might believe it or not, in their discretion.

With respect to the last point, it appears that there was a prior insurance to the amount of 3,000 dollars. The bottomry is stated by *Mitchell* to be 2,000 dollars, and the value of the vessel 7,000 dollars. What was the rate of premiums does not appear. If these sums be added to the probable premiums, there would remain a sufficient sum to warrant this insurance, had it been an insurance on interest. That this was a valued insurance at 2,000 dollars, cannot affect the question; the valuation is only conclusive between the parties to this policy. The only evidence that the valuation of this vessel was 7,000 dollars, is derived from the plaintiff's affidavit, which, it must be remembered, was read by the defendant to the jury, who, it seems, believed that fact. I see no reason to differ from the conclusions drawn by the jury, and am, therefore, of opinion, that a new trial ought not to be granted.

Judgment for the plaintiff.

(a) The cases of *King v. Inhabitants of Middlesex*, (2 Term Rep. 41.) and *Thompson v. Jones and Passel v. Godsall*, there cited. *Bowles v. Langworthy*, (5 Term Rep. 366.) *Wharam v. Routledge*, (5 Esp. Cases, 235.) are in support of the rule as laid down by the judges in the cases of *Lawrence & Whitney v. Van Horne & Clarkson*, (1 Caines, 277.) But in the case of *Gordon v. Secretan*, (8 East, 548.) the rule was said to have been since overruled, and was denied altogether; and it was held that the production of an instrument at the trial pursuant to notice, did not supersede the necessity of proving it. See also *Sayre v. Kitchen*, (1 Esp. 209.) And see 2 *Erss's Pothier*, 187.

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FRANKLIN *against* LOW and SWARTWOUT, Adminis-
trators of BAUMAN.

No action will lie against the executors or administrators of a postmaster for bank notes stolen by one of his clerks out of a letter delivered at the post-office. Could an action be maintained against the postmaster himself, if living? *quare.*

THIS was an action of *assumpsit* for money had and received by the intestate. Plea, general issue. The cause was tried at the *New-York Sittings*, the 23d April, 1805, before Mr. Justice Thompson, when the jury, by consent, found a verdict for the plaintiff, subject to the opinion of the court on the following case.

On the 13th day of May, 1803, the agent of the plaintiff put into the post-office, at *New-York*, a letter, directed to the plaintiff at *Providence*, in the state of *Rhode-Island*, where he resided, containing eight hundred dollars, in bank notes issued by the bank of the *United States*. At that time, and long before, and afterwards, *Sebastian Bauman*, the deceased intestate, was the postmaster at *New-York*, and had the charge of the post-office in that city. On the 13th day of May, and before that time, one *Burlidge* was employed by *Bauman*, as a clerk in the post-office, and was hired and paid by him; and on the same day the letter was broken open, and the money embezzled by *Burlidge*.

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* *Bauman* was appointed postmaster of the city of *New-York*, by the postmaster-general of the *United States*. All the postmasters receive from the postmaster-general, with their appointments, printed instructions for the government of their respective offices. In the instructions given to the intestate, it was directed that every assistant and clerk employed in the post-office, should take an oath for the faithful performance of the duties required of him, which was to be certified and sent to the postmaster-general; and that the postmaster was to be answerable for the fidelity and care of every person employed by him; and he was to suffer no person, unless employed by him, to inspect or handle any letters, newspapers, or other articles which might come under his charge. The intestate took no bond or other security from the said clerk for the faithful execution of his duty; nor did it appear from any evidence offered, that he had taken the oath of office prescribed by the instructions of the postmaster-general.

It was agreed, that in case the court should be of opinion that the plaintiff was not entitled to recover, then a judgment of nonsuit should be entered; otherwise the verdict was to stand, and the plaintiff to be entitled to judgment. No objection was to be made to the form of action.

Bogert, for the plaintiff. The present is a case of the first impression, arising under the act of Congress for the establishment of the post-office. Two cases have been decided in *England*, which may be thought applicable to the present

that of *Lane v. Cotton*,† decided in the time of Chief Justice *Holt*; and that of *Whitfield v. Lord Despencer*,‡ decided by Lord Chief Justice *Mansfield*. The correctness of those decisions may not only be questioned, but it will be found, on comparison, that there is a material difference between them and the one now before the court. In *England*, by the statute of 9 *Anne*, for erecting a general post-office, a postmaster-general is appointed by patent, who is required to appoint inferior officers, *clerks, sorters, &c. All the inferior officers are appointed in the king's name, give security to, and are paid by, the *receiver-general*, and not by the postmaster-general, who is expressly exempted by the act from any responsibility for the officers so appointed, being liable only for his own voluntary defaults and misfeasances. Those inferior officers are, therefore, the servants and agents of the government. By the act of Congress, the *postmasters*, or deputies of the postmaster-general are not obliged to employ *clerks*, or *sorters* of letters. If the postmaster employ clerks in his office, he must pay them; they are his servants; there is no privity between them and the postmaster-general, or the government. By his instructions it is expressly stated that he alone is to be answerable for the conduct of the persons he may think proper to employ. He is required only to administer an oath to such persons, previous to their entering on the discharge of their duties. His clerks, therefore, must be considered as ordinary servants, to whom he pays wages, and for whose conduct he is responsible as in other cases. They give no security to government; nor are they paid by government. The provisions of the act of the *United States* are wholly unlike those found in the *British* statutes; and decisions on the latter ought not to govern the determination of cases arising on the former. In the case of *Lane v. Cotton*, Lord *Holt* dissented from the rest of the court, who determined against the liability of the defendant; but the opinion of *Holt* has been deemed by respectable writers the better opinion.|| *Powys*, J., held that an action would lie against *Breese*, the receiver of letters in the general post-office. Unless, therefore, the decisions of the *English* court, though founded on *English* statutes, are regarded as conclusive and binding authorities in this case, the plaintiff, on general principles, is entitled to recover.

An objection will, perhaps, be made, that this suit will not lie against executors or administrators. In the case of **Hamblly v. Trott*,¶ the distinction between what actions will survive, and what die with the person, is expressed with great clearness. Wherever the cause of action is money due, or a contract to be performed, or gain, or acquisition by the labor or property of another, or on a promise expressed or implied by the testator, the action survives against his executors; otherwise, if it be a *tort*, or arise *ex delicto*, or supposed to be by *force* or against the peace. Here the action is for money

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† 1 *Ld. Raym.*
646.

‡ *Cowp.* 754.
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§ *Laws of the*
U. S. vol. 4. p.
106. Cong. 5.
sess. 2.

|| *Jones's Law*
of Bailments,
110.

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¶ *Cowp.* 371

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received by the defendant or by his agent, which is the same thing, under an implied contract to deliver it according to its direction. It is a question of property. It is agreed by the case, that no objection is to be made as to the *form of action*, or the *pleadings*.

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Harison, for the defendants. Whatever difference may be found to exist between the *English* statute and our act, it will not vary the merits of the case. By the act of the *United States*, *postmasters* are appointed by the postmaster-general, take oaths, and give bonds, and hold their offices during pleasure, as in *England*. There may be some difference in regard to the *sorters* of letters. An action like the present could not certainly be sustained in *England* against the postmaster-general; and the deputy postmasters must be considered as standing on the same ground. The case of *Lane v. Cotton* was against the postmaster-general, for exchequer bills delivered to a deputy under the act; and three judges against *Holt* decided that he was not liable. Though the great learning and talents of the lord chief justice entitle him to very high and merited respect, yet his name alone is not to outweigh the rest of the judges, supported, as their decision is, by the unanimous opinion of the court, in a subsequent case, as delivered by Lord *Mansfield*. *Powys, J.*, to be sure, throws out the idea that an action would have lain against *Breese*; but Chief Justice *Holt* very justly observes, that if *Breese* took out the bills, he would be *liable as a *tort-feasor*. Lord *Mansfield*, in the case of *Whitfield v. Lord Despencer*, considered the law as well laid down in *Lane v. Cotton*, in 1701, and as having been acquiesced in, and considered as the law by all classes of people since that period. The circumstance of the office being patent in *England*, and the oaths and bonds required, can make no difference in the case. They are matters merely between the government and its agents, and intended as a security to the former; and are not to be brought into a consideration of this question. The decisions in *England* have proceeded on the broad basis of public policy and convenience. The most convenient and the only practicable rule is, that the public officer should not be answerable for the misconduct of others; leaving to the parties injured their remedies against the immediate *tort-feasors*.

The neglect of *Bauman* to administer the oath to his clerk might render him liable to the government, but not to third persons. The instructions, it is true, say that he shall be responsible for the acts of his servants. But to whom? To the government; not to the rest of the world. Further, it has been decided, that a steward or manager of an estate, appointed by the Court of Chancery, was not liable for any damage done by those employed by him in the service of his principal; but that the action must be brought against the person

who did the injury, or the principal. No action will lie against the intermediate agent.†

But admitting that *Bauman* would have been liable in his life-time, no action can be maintained against his administrators. To sustain *assumpsit* for money had and received to the use of the plaintiff, it ought to be shown that the money actually came to the use of *Bauman*, which is not pretended. *Trover* will not lie; and if it be a *tort* in *Bauman*, the right of action died with him. The plaintiff must resort to the clerk, the immediate *tort-feasor*.

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†6 Term Rep
411. *Stone v.*
Cartwright.

**Hoffman*, in reply. The postmaster is bound to forward all letters received in his office, and if he fail to do so, it is a breach of his duty; and an action of *assumpsit* will lie against him, on the implied contract, for a neglect or breach of his official duty. In this respect, the receiving the letter and money, and not forwarding them, though by a clerk in the office, must be considered as the act of the master.

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In the case of *Lane v. Cotton*, the action was brought against the *postmaster-general*, who did not appoint or pay the inferior officers. Here the action is against a deputy, who appoints and pays his own servants. In *England*, all the officers have *fixed* salaries. In this country, the deputy postmasters are allowed a commission on all letters received. They have no salary, but so much *per cent.* on what they receive. In *England*, the embezzlement would be *felony*, in which the contract would be merged. Here it is only a misdemeanor. On principles of policy, it is of importance that postmasters should be made liable, as it will render them more vigilant and faithful, more careful in the choice of their servants, and more attentive to their conduct. On the general principles of law, in relation to bailments, there is nothing to distinguish this case from that of any *carrier for hire*. If a private individual should set up a post-office, and undertake to carry letters for hire, there would be no doubt of his liability in such a case. Because the government has thought proper to establish a general post-office, and draw a revenue from the carriage of letters, why should the *obligations* of parties be varied, or individuals be rendered less *secure* in the transmission of letters than they would have been before such an establishment? Why limit the responsibility of the postmaster for the acts of his servants solely to government? It concerns the public at large. The language of his instructions is, You may execute the duties of your office personally, or employ clerks; but if you employ **clerks*, you must be answerable for their acts. He can take adequate security for the good behavior of his servants, and thereby protect himself and the rest of the world against the consequences of their misconduct.

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SPENCER, J. The only question in this case is, whether any suit can be maintained against the representatives of a

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deceased postmaster, for the embezzlement of money by a clerk in the office, by taking the same out of a letter deposited in the office for transportation by the mail.

I think that this action is not maintainable against the representatives. I avoid giving any opinion whether the principal, if alive, would be responsible for the fidelity of the clerk, either under the particular circumstances of this case, or on general grounds. It is a general and universal proposition, that personal actions founded in tort, or for misfeasance, die with the person. That this cause of action arises *ex delicto* cannot be controverted; no action would lie on an *assumpsit*, because, though the clerk received the money, it was taken feloniously and contrary to his duty and trust; it never came to the hands of the intestate. (3 Wils. 429. 443. 1 Bos. & Pull. 404. &c. 1 East, 106. 6 Term Rep. 125. 1 Salk. 282.) The regular form of declaring would be on the misfeasance of the clerk, and the only plea would be not guilty. There is not, in my recollection, an instance of *assumpsit* having been brought in a case like the present. From a variety of cases which confirm the position that this action cannot be maintained against the representatives of a party, I will cite only those of *Hambly v. Trott*, (Couper, 371.) and *Baily v. Births & Wife*, (T. Raym. 72.) In the case first cited, Lord Mansfield considered the plea of not guilty as decisive. That was an action of trover, and though his lordship considered it substantially an action founded on property, it was held not to lie. He says, "If it is a sort of injury by which the offender acquires no gain to himself at the expense of the sufferer, then the only reparation is, for the *delictum* in damages to be assessed by a jury; but where, besides the crime; property is acquired *which benefits the testator, there an action shall survive against the executor, as for instance, the executor shall not be chargeable for the injury done by cutting down another's trees, but for the benefit arising to his testator, for the value or sale of the trees, he shall." The case cited from Sir T. Raymond goes further. It was an action on the case; the declaration stated the plaintiff to have been possessed of a cow, which he delivered to the defendant's testator to keep in his pasture for the plaintiff, and to be redelivered to him, but which he sold, and converted and disposed of the money to his own use; the plea was not guilty; the jury found for the plaintiff, and the judgment was arrested on the ground that it was a *tort* with which the executor ought not to be charged. This case is cited by Lord Mansfield, in the case of *Hambly v. Trott*, with approbation. It is agreed in all the books, that an action does not lie against the representatives of a sheriff for an escape, whether suffered by himself or his deputy, and the reasons are, that the form of action requires a plea of not guilty, and that the guilt of a deceased person is tried; and that the assets are not benefited. Whether originally the law was wisely established, is not for me to

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inquire ; it is sufficient for me that it is established, and that we are bound to pronounce it. The plaintiff must be non-suited.

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KENT, Ch. J., THOMPSON, J., and TOMPKINS, J., concurred.

LIVINGSTON, J. This case is very distinguishable from those that were cited. In *Lane v. Cotton & Frankland*, (1 *Ld. Raym.* 646.) there was an express provision in the patent, constituting the defendants postmasters-general, "that they should not be chargeable to account for the mismanagement or default of their inferior officers, but only for their own voluntary defaults." Though I should have supposed that this was intended only as a protection against the government's calling on them for such defaults, it is a clause which is relied on in giving judgment. It is also considered as a circumstance in favor of the defendants *that their reward was settled, and not depending, as here, on the number of letters carried ; but even in that case, *Holt* was in favor of their liability ; and so, probably, would the other judges have been, if the defendants had taken the office as the intestate did here, on the express condition, as stated in the instructions, of being responsible for the "fidelity of his agents." It is highly reasonable that this should be so, for such liability will greatly increase the security of the public, not only by preventing collusions between the principals and their servants, but by rendering the former more circumspect in their choice, more watchful over their clerks, and particularly more attentive in taking bonds for their faithful conduct. It may, it is true, now and then fall hard on a postmaster ; but it is better it should be so, than that individuals should be without remedy for injuries committed by their agents.

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But if a cause of action ever existed, it died, it is said, with the intestate ; though this was not strongly insisted on. To go through all the cases which have sprung from the maxim of *actio personalis moritur cum persona*, would tend, as Lord Mansfield says, "rather to confound than elucidate." If literally applied, not even debt or *assumpsit* would lie against executors on a note or bond of their testator. This, however, is not its construction ; for courts, finding the inconvenience of being frequently called upon to apply a maxim, the generality of whose language is well calculated to mislead, have endeavored to restrain it within reasonable bounds. In *England*, therefore, if the suit which is brought does not require a plea of *not guilty*, it will generally be sustained. It must, and ever will, remain incomprehensible to one of common discernment only, why this criterion has been adopted as a test of an executor's liability, rather than the intrinsic merits of the plaintiff's demand. Shall a man carry away the goods, or convert the property of another, or defraud him to any extent, or injure him by his negligence, *and his estate not be answerable,

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† Ante, p. 37.
Hatten v. Spey-
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† *Cowper*, 371.

because no action but that of trespass, trover, deceit, or some such will lie, the general issue in all which is *not guilty*? In a case of bankruptcy, † we refused to put a defendant's responsibility to so precarious a test, but looked at the real cause of action, which we considered as barred by the discharge, though a plea of not guilty might properly have been interposed. Without, however, interfering with any adjudged case, it may safely be said, consistently, too, with the case of *Hambly v. Trott*, ‡ that wherever there be a *contract* expressed or implied, and that on a valuable consideration, from which a benefit has, or might have resulted to the testator, for the faithful conduct of a third person, an action will lie against his executors on the contract, whether the breach alleged be a *tort*, or any other misconduct of the party. Such is the case here. A postmaster accepts an office, highly beneficial; and, in consideration of such advantages, assumes a responsibility for his clerks. If this be the situation of a postmaster, it would be easy and right to sue him, or his executors, in a special action on the case on his contract, for the misfeasance of his clerk, which would drive the defendant to his plea of *non assumpsit*, and relieve the case from the difficulty that would arise from the plea of *not guilty*. Though a *tort* in the clerk, it is on his *contract* that the postmaster is liable; and, accordingly, it was the opinion of *Gould*, in the case cited, that "if any thing could support this action, it must be a contract expressed or implied." If an action, then, can be brought on the contract, as I think it can, there is an end of all the difficulty about the plea. The plaintiff, in my opinion, is entitled to judgment. (a)

Judgment of nonsuit.

(a) In *Adair v. Shaw*, (1 *Scho. & Lefroy's Rep.* 264.) Lord *Redesdale* understands the rule of law to be according to the case of *Hambly v. Trott*, that if a man become possessed of the property of another, though he came possessed by *wrong*, and might during his life be made answerable for the wrong, yet that does not destroy the right which the other party had to the thing itself, or the value of it, and he would have a remedy for any thing of that description, after the death of the wrong-doer against his executors! He cites also *Sarille*, 40. *Perkinson v. Gilford*, (1 *Cro. Car.* 539.) the authorities on which Lord *Mansfield* relied in *Hambly v. Trott*. See also *Garth v. Cotton*, (1 *Dickens's Rep.* 215. 1 *Vesey*, 564.)

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*VANDENHEUVEL against THE UNITED INSURANCE COMPANY.

If certain articles be enumerated in a policy of insurance, and a moiety of them be lost, the assured may abandon as for a total loss, though the loss is not equal to a moiety of

THIS was an action on a policy of insurance on the cargo of the brig *Eliza*, from *Demerara* to *New-York*. The cause was tried at the *New-York Sittings* in *January*, 1806, before Mr. Justice *Livingston*. The cargo insured consisted of 191 hogsheds of sugar, 22 bags of coffee, and 30 puncheons of rum; the whole valued in the policy at 20,802 dollars and 9 cents. There was property on board insured to the value of 26,053 dollars. The vessel was insured, and valued at 5,000 316

dollars, though worth but 4,500 dollars. The freight from *Demerara* to *New-York* was 1,772 dollars. The *Eliza* was captured, on the 6th of *September*, 1803, and carried into *St. Kitt's*. An examination in *preparatorio* against vessel and cargo was had at that place. The vessel afterwards proceeded to *Antigua*, where a Vice-Admiralty Court was held, and an order of restitution granted on the ground, that the captor had neglected to prosecute his claim. In consequence of the order, the master took possession of the vessel on the 12th *September*, previous to which the vessel and cargo had remained in the possession of the captors, and the vessel had been much injured in consequence of the inattention and neglect of the persons to whose custody she had been committed. On the 14th of *November*, the captors obtained an order for seizing the cargo; in consequence of which, the captors again took possession of the cargo and of the vessel, but the vessel was not proceeded against. On the 14th of *December*, 1803, a considerable part of the cargo, but much less than a moiety, being the produce of an estate owned by the plaintiff in *Demerara*, was condemned as enemy's property. The residue of the cargo was acquitted. The master prayed an appeal, but was unable to procure the requisite security. The captors threatened to appeal from that part of the sentence which acquitted the residue of the cargo, and to avoid further detention and trouble, the master compromised with the captors, who agreed *to receive the sum of 5,000 dollars for the property condemned. Finding it impracticable to raise the money by the sale of bills, the master, with the permission of the Vice-Admiralty Court, sold a part of the cargo, to wit, 102 hogsheads of sugar, and 29 puncheons of rum, being more than a moiety of the goods insured, in quantity, and in value, according to the policy. The proceeds of the sale, amounting to 5,929 dollars, were applied to pay the ransom money, charges of sale, and expenses attending the same. The vessel, with the residue of the cargo, left *St. Kitt's* on the 21st of *January*, 1804, and arrived at *New-York* on the 17th of *March*. During the voyage she experienced bad weather, which occasioned her to leak, and damaged the cargo. The plaintiff abandoned his interest to the defendants, on the 28th of *February*, 1804, which was renewed on the 17th of *March*. On a survey of the cargo at *New-York*, it was found to have sustained sea damage to the amount of 10 per cent., supposed to have arisen during the voyage from *St. Kitt's* to *New-York*. The property was sold by consent, and without prejudice to the rights of the parties. The loss on the goods sold at *St. Kitt's*, arising from the difference of the market there and at *New-York*, was 3,278 dollars. Three accounts, marked *A.*, *B.* & *C.*, were annexed to the case; the first contained the expenses incurred at *St. Kitt's*, from the 23d of *September* to the 12th of *November*, the time of acquittal in paying seamen's wages and provisions;

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the whole cargo. Where a vessel and cargo were captured, and proceedings in the Admiralty Court were against the whole cargo, and part condemned, and the residue released, and to prevent an appeal, and avoid further detention, the master agreed to pay a specific sum, as a ransom, and sold a part of the cargo, being more than a moiety of the part insured, to defray the expenses, and pay the ransom; it

[* 407] was held, that the sum paid for ransom and expenses was not general average, but must be borne by the cargo alone, and that the plaintiff was entitled to recover for a total loss

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the second contained the expenses from the 12th of *November* 1803, to the time of the vessel's departure from *St. Kitt's* including seamen's wages and provisions; the third contained the amount of *ransom money*, and the expenses incident to the sale of a part of the cargo for that purpose.

The jury found a verdict for the plaintiff for a total loss, and it was agreed that it should be modified under the direction of the court on a case stated. The plaintiff consented that such proportion of the general average as was chargeable on vessel and freight should be charged to him, waiving any right to throw the same, in the first instance, on the defendants.

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*The following points were raised for the consideration of the court. 1. Whether the plaintiff is entitled to recover for a total or a partial loss. 2. Which items in the account *B.* are general average, and which a particular charge on the cargo; and whether the plaintiff is entitled to interest on them, and for what period. 3. Whether the vessel and freight are chargeable with any of the items contained in the account *C.*, or any part of the loss on the sale of the cargo therein specified, as general average. 4. Supposing the abandonment to be established, is the plaintiff, who is owner of ship and cargo, entitled to full freight for the whole cargo from *Demerara* to *New-York*, or for the part only brought to *New-York*, and *pro ratâ itineris* for the residue? It was agreed that the court should appoint some fit person to state the account of general average on such principles as they should direct.

T. L. Ogden, for the plaintiff. If all the items and expenses be estimated, the amount will be more than a moiety of the value of the cargo, and sufficient to justify the abandonment. It will be said that a part of these charges are to be borne by the vessel alone, and that the loss is thereby reduced to an average. But all the expenses and charges have been paid by the plaintiff out of his own funds, and beyond a moiety of the value. The question of contribution by the owners of vessel and freight is not to be raised here, and the plaintiff is a creditor for the whole loss.

The money paid for the ransom or liberation of the property, is not to be considered as general average; for though the proceedings first commenced against vessel and cargo, yet the vessel was released, and all the subsequent proceedings which led to the ransom, were against the cargo alone. The vessel and freight were not brought into jeopardy. The cargo only was benefited by the ransom; the freight was not in danger by the capture, for had not the liberation been effected, the captors would have been obliged to pay the freight. The vessel was always in a condition, and ready to proceed, and was entitled to full freight.

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Hoffman and *Harison*, for the defendants. To justify the abandonment, the plaintiff must show that one half of the cargo

has been lost. The value of the whole cargo is 23,455 dollars, and the whole loss, as stated, does not amount to a moiety; it is at least one hundred dollars less. The whole cargo, as well the part not insured, as that included in the policy, is liable to make good the loss. All the cargo was libelled; the proceedings were against the whole; and all was put in jeopardy; the ransom was of the whole cargo, and not of the part only that was insured. If so, then, on no calculation whatever that can be made, will the loss amount to a moiety of the whole cargo. The plaintiff charges all the expenses and loss on the part insured; but where justice can be done by considering the case as a partial loss, courts ought not to be *astute* to find grounds for converting it into a total loss. The defendants are willing to pay a complete indemnity. Again, when the vessel and cargo were first carried in, both were detained, and the examinations *in preparatorio* were against both. All the expenses, therefore, from the time of capture until the release of the vessel, or when it appeared that the proceedings were against the cargo alone, are clearly *general average*, and this includes the account marked *A*. Many of the items in the account *B*., and several in *C*., clearly belong to a general average, or a particular loss on freight. Freight is due only for the cargo brought into *New-York*. It is true, that by an artificial, though just reason, the courts of admiralty order the payment of freight; but if the ransom were necessary to entitle the plaintiff to the whole freight, then the freight has been benefited by the ransom, and ought to contribute with the cargo. The subsequent sea damage cannot be taken into the account to enhance the loss. Subsequent events cannot justify an antecedent abandonment. The abandonment made in *February* must be referred to the loss at *Antigua*. But if taken into consideration, it ought to be calculated on the whole cargo, and not on the part which arrived at *New-York*. The defendants are willing to pay all that can be reasonably demanded, that is, all the loss sustained at *Antigua*.

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**Radcliff*, in reply. This is a valued policy, and the parties are bound by the valuation. The valuation is on *specific articles* mentioned in the policy, and not on the cargo generally. The true rule is, that when a moiety of the subject insured is lost, the insured have a right to abandon. Otherwise, the whole subject insured might be lost, and yet the insured could not abandon, because it happened to be less than half the value of the whole cargo. Here is a loss of 102 hogsheads of sugar, and 29 puncheons of rum, which is a *specific* loss of more than a moiety of the articles insured.

All the proceedings in the Court of Admiralty evince an intention to proceed against the cargo alone: the detention of the vessel became necessary for the sake of the cargo. On general principles, as well as on the rules adopted by the Ad-

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† 2 Rob. Adm.
Mc-p. 293.

11 Cui ves, 574.

miralty Court of *Great Britain*, the whole freight was due. The cargo only was taken, and condemned as enemy's property. A neutral vessel is entitled to freight, and hence the maxim established by the belligerent, that a capture is tantamount to a delivery of the cargo.† The damage of 10 per cent. on the cargo coming from *St. Kitt's*, must be calculated on the goods saved, and not on the whole cargo; and as the abandonment was renewed on the arrival of the vessel, this must be considered as a part of the loss. In the case of *Leavenworth v. Delafield*,‡ it was decided, that the actual value of the vessel at the time of loss, not the valuation in the policy, must be taken, in calculating the average. On principle and authority, therefore, the plaintiff was justified in making the abandonment, and is entitled to recover as for a total loss. He cited *Millar on Insurance*, 342. 2 *Brown's Civil and Admiralty Law*, 198, 199. *Abbott*, 274. 2 *Marshall*, 460. *Park*, 121. 3 *Rob.* 304. 1 *Rob.* 388. *Snell, Stagg & Co. v. Unit. Ins. Co.* in this court, in MS.(a)

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LIVINGSTON, J., delivered the opinion of the court. This is a valued policy on *specific articles*, part only of which being condemned, the master, to prevent the embarrassment of an appeal with which he was threatened by the captors, agreed to give them 5,000 dollars. To raise this sum, it became necessary to sell, of the merchandise insured, *not only more than a moiety in quantity, but also in value. From this brief statement it would seem to result, on principles long and well settled, that a technical total loss had happened.

The first objection to this claim is, that if the other cargo on board, which was not insured, be taken into calculation, the part sold will fall short of a moiety, and the loss be turned into a partial one. The residue of the cargo, this being an insurance on particular articles, is not to be brought into the computation. In settling and distributing an average loss, it is proper to look at every thing on board; but when a moiety of any portion, *specifically underwritten*, has been lost, its owner may abandon, however small its proportion may be to the whole lading. If *A.*, having one barrel of sugar, and a hundred hogsheads of the same article in one vessel, insure only the former, which is taken away by a pirate, or otherwise lost, he will recover the whole insurance, though the property remaining may be more than fifty times its value.

It is next said, that all the expenses, as exhibited in the several accounts, with the loss on the sugars sold, make a general average, to be borne by vessel, freight, and whole cargo, as well the part uninsured as that which was covered, and that on such an estimate the loss will only be partial. Without denying the correctness of this argument, when

(a) See *Judah v. Randall*, (2 *Cuines's Cases in Error*, 324.) *Smith v. Bell and others* (2 *Cuines's Cases in Error*, 153.)

expenses are incurred, or a ransom paid, manifestly for the liberation of all these subjects, (which may well be denied here,) it is inapplicable to these parties, because the plaintiff, who was also owner of vessel and freight, had, with his own funds, and previous to the disposal of any of the cargo, paid more than the proportion chargeable on all the interests mentioned, except the insured articles, which were sold, or a part of them, to raise their own assessment, allowing every thing to be general average. The underwriters not having advanced the contribution payable by that part of the cargo which was insured, they cannot complain if they be called upon for their whole subscription, if to furnish this sum more than its moiety was sacrificed; for the owner was a sufferer to that extent by its sale, and may, therefore, if he please, regard *the loss as total. If the vessel and residue of the cargo had been owned by strangers, which was in part the case, who had advanced their proportion of ransom and expenses, but to raise the share allotted to the insured part of the cargo, more than a moiety had been sold, it would most clearly have rendered the defendants liable for a total loss. This ownership being in the plaintiff can make no difference, for in either case it would be unjust to throw any part of the loss, arising from a sacrifice of the cargo, on those who are not in default, but had already advanced more than on any statement could be necessary to redeem their interest from the impending jeopardy. If, then, the ransom be not a general average, there must be an end to all question as to the totality of the loss, if it be true, as the case admits, that more than one half of the subject insured in quantity and in price, was disposed of to raise it.

It seems to be thought by the defendants, that a right to freight depended on the release of the cargo, and that, therefore, it should bear its proportion of any expense incurred, to obtain its restitution in part, or in whole. This proceeds on the supposition, that in case of a confiscation, freight is always lost. What was the direction here, as to the freight of the forfeited articles, does not appear. As the sentence proceeded on the ground of enemy-property, it ought to have been, and we may therefore presume it was, or would have been, allowed. This is conformable to the practice of *British* courts of admiralty, when property is condemned for no other reason than its belonging to an enemy. Freight, therefore, not necessarily depending on the sale of the cargo, ought not to be burdened with any part of its ransom. In *Maggrath & Higgins v. Church*, this court decided that in case of general average, the proprietor of the cargo is not bound to look to the owner of the vessel and freight for his proportion, but may immediately call on his underwriter for indemnity, leaving him to his suit over against the other parties. This principle, which would put an end to this controversy, we are not at liberty to apply here, because the plaintiff has consented to be charged with

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the proportion of *any general average payable by vessel and freight, without throwing it, in this suit, on the defendants.

Upon the whole, we are of opinion, that the plaintiff is entitled to recover as for a total loss. The *items* in the account *B.*, which arose after the restoration, having been expended solely for the benefit of the cargo, and not to obtain a liberation of the vessel, which was not brought into controversy, must be borne, not as a general average, but as a particular charge on the whole cargo.

For the same reason, the vessel and freight are not chargeable with any part of the loss on the sales of the cargo, or on the disbursements in the account *C.*, except so far as the parties are concluded by their own admissions in respect to the canvass and pork; the other *items* appertain to the cargo only, and must be borne proportionally by the defendants. The defendants will of course be credited with the net proceeds of the cargo sold at *New-York*, deducting from such sales the freight as well as other charges. The plaintiff is entitled to full freight, because the taking out of the cargo at *St. Kitt's* must be considered as the owner's own voluntary act, and for his benefit, to raise a sum which he agreed to pay as a ransom, and because, had it not been for this compromise, the vessel would have been entitled to, and probably have received, at *St. Kitt's*, as much freight for the articles condemned, had they been sold there, as if they had been brought to *New-York*, and have been also entitled to the balance of freight, on a delivery of the residue of the cargo there.

On the proportion of expenses, to which the defendants are liable beyond a total loss, it is right that interest should be allowed to the assured, from the time the money was advanced, and on the balance due, for a total loss, from the expiration of the term limited by the policy.

Upon these principles, Mr. John Ferrers will state an account, and the verdict will be so modified as to correspond with his report, for which sum judgment must be entered for the plaintiff.

Judgment for the plaintiff

[*414] *MUMFORD and others *against* M'PERSON and others.

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Where the parties in the sale of a ship reduced the contract to writing by a bill of sale, it was held that no action would lie on a *parol* warranty made at the time of

THIS was an action on a warranty, on the sale of the moiety of a ship. The cause was tried at the *New-York Sittings*, the 10th of *January*, 1806, before Mr. Justice *Livingston*. On the trial it appeared that a regular bill of sale for the moiety of the ship had been executed and delivered by the defendants to the plaintiffs. It was in the usual printed form, reciting the register, and with a covenant to defend the moiety of the said ship

against all persons, &c. The warranty declared upon was, "that the ship was completely copper-fastened," and to prove this, an advertisement for the sale in the public papers, in which she was described as *composition-fastened, complete for coppering*, was offered in evidence. A witness was also called, who was present when the bill of sale was about to be delivered to the plaintiffs, when one of the defendants, who brought the bill of sale with him executed by the other defendants, before delivering it to the plaintiffs, and before the payment of the purchase-money, in answer to a question from one of the plaintiffs, declared, that the vessel was completely copper-fastened. The defendants objected to this evidence, and the same being overruled by the judge, the plaintiffs were nonsuited.

A motion was now made to set aside the nonsuit. Two questions were raised for the consideration of the court. 1. Whether the advertisement was proper proof to establish the warranty stated in the declaration. 2. Whether, when a bill of sale, or other equivalent instrument in writing, is executed and delivered to the vendee, he can maintain an action on a warranty by parol, where there is no allegation of fraud.

Bogert, for the plaintiffs. This case forms an exception to the general rule, that parol evidence is not admitted to explain or vary a written instrument. A bill of *sale is required by the law of the *United States*, in the transfer of vessels, from principles of policy in relation to navigation and revenue; but it is not of the essence of the contract of sale, nor necessary to the transfer of the thing from the vendor to the vendee. If, for a valuable consideration, the owner of a ship sell and deliver her to another, the property is completely transferred; though, without a bill of sale in the manner prescribed by the act, the vessel in the hands of the new possessor would not enjoy the benefits and privileges of an *American vessel*. Matters *dehors* the instrument may be given in evidence where the action is founded on fraud and deceit in the sale. Almost all the ancient actions in regard to fraud and deceit in sales, are founded in *tort*; but in modern times, the action most used is *assumpsit*; and where *assumpsit* is brought on a warranty, no *scienter* need be alleged or proved.† In the case where a person sells a term, and warrants the term to be of a certain value, or free from encumbrances, an action will lie on this *parol warranty*.‡ So an action will lie on a warranty or representation, as to the value of an estate, made to induce the persons to buy it, though a deed be afterwards given.§

[*Court*. Can a case be found where an action has been brought on a *parol* contract, made *uno flatu* with a written contract? The cases you cite are all on *deceit*]

In these cases, though not precisely to this point, will be found

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sale, and where
no fraud was
alleged.

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† 2 *East*, 451.
Williamson v. Allison.

‡ 3 *Term Rep.* p.
55. 59. *Paisley v. Freeman*.
Roll. Abr. 95
Yalverton, 20,
21.

§ 1 *Ld. Raym*
1118. *Lydney v. Selby*.

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† *Douglas*, 17.
Stuart v. Wil-
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‡ *Peake's Law*
of Evidence,
117, 118. 2d
edit.

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the principles for which we contend. Actions for a *deceit* have been superseded by *assumpsit*.† It is the same as if it were an action of *deceit*; the contract is not rescinded; the party keeps possession, and brings his action for the damages. Where the matter offered in evidence does not contradict the written instrument, but is merely to show a collateral fact, in order to explain the intention of the parties, it may be proved by *parol*.‡

[KENT, Ch. J. You do not show any express authority, that where you have reduced a contract to writing, and the previous conversations are thereby merged in the *written instrument, you can bring an action on such previous conversations.]

T. A. Emmet, for the defendants. All the cases which have been cited are those of *deceit*; where the *gist* of the action is *tort*. It may be true that an action would lie for the false affirmation or fraud; but it does not follow that the party can have an action grounded on the *warranty*, *dehors* the written contract. The different actions in regard to sales, were, 1. *Deceit*; 2. *Warranty*; 3. *Assumpsit*. The change that has taken place in later times, has been from *warranty* to *assumpsit*, and not by substituting the latter for the action of *deceit*. *Assumpsit* has been resorted to, in order to enable the plaintiff to add the money counts, and to incorporate warranty with *assumpsit*.§ The contract for the sale of this vessel is one and indivisible; it has been reduced to writing under the hands and seals of the parties. An attempt is now made to prove another contract under a special warranty; for a contract with one warranty is quite different from a contract with two warranties. The case cited from *Yelverton* is not in point; it is law only in regard to an action of *deceit*; what is said about warranty is a mere *obiter dictum*. If a man will make a foolish or imprudent assertion, and the party insists on a warranty, he shall have his action of warranty. For he cannot maintain an action of *deceit* for a mere assertion. The case from *Peake* is one of a *latent ambiguity* in a deed, which, it is agreed, may be explained by *parol*; but here the plaintiffs wish to set up a particular warranty not contained in the deed. The distinction about the sale of a ship is not well founded. This species of property has from very early times been transferred by written instruments. It is a well settled and safe mode of conveyance, prescribed by law; and when the parties have thought proper to follow this mode, and to make use of a deed to express their contract, that deed must contain all the stipulations between them. In this bill of sale there is but one warranty; and it is a new *doctrine that there can be a warranty in writing, and a warranty by *parol*, in the same contract.

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Benson, in reply. A bill of sale is merely *symbolical* of the delivery of the ship. The property in a vessel will pass with-

out any written instrument. Suppose a sale of a mere hulk, not intended for future navigation, and the vendor should, at the time, affirm or warrant that she contained a certain number of bolts; and there should be a receipt or memorandum of the sale, without expressing the warranty, would not an action lie on such parol affirmation or warranty, which must have been an inducement to the purchase? The bill of sale is merely to identify the vessel, and the register is inserted for that purpose, and to establish her national character. These bills of sale are printed forms, used for the sake of convenience, and to enable vessels to enjoy the privileges conferred by the statutes on *American bottoms*. (a) The cases relating to real estates do not apply. They always pass by deed, and you may protect yourself by covenants. As the vendee may examine the title, or rely on the covenants, the maxim is *caveat emptor*.

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THOMPSON, J., delivered the opinion of the court. This is an application to set aside a nonsuit granted at the trial. The warranty alleged to have been made is, *that the ship was completely copper-fastened*. Upon the trial, the bill of sale was produced, which contained no such warranty. The plaintiff then offered to prove by *parol*, that one of the defendants, after the bill of sale was executed, and before it was delivered, did, to a question put by one of the plaintiffs, express himself to the effect of the warranty contained in the declaration. The plaintiffs also offered to prove, that the defendants, in advertising the ship for sale, had described her as composition-fastened, complete for coppering. This testimony was overruled, and the question now presented is, whether it ought to have been admitted, and was sufficient to maintain the action.

*The plaintiffs were rightly nonsuited. It is not pretended that there was any fraud in this case. The action is founded upon a supposed warranty. Had the plaintiffs' claim rested on a deceit in the sale, the advertisement offered might have been admitted, as a circumstance tending to establish the fraud; but it could have no relevancy to the establishment of a warranty that depended upon the contract between the parties. But admitting a parol warranty to have been fully proved, no action could have been maintained upon it. The contract between the parties was reduced to writing, and contained in the bill of sale, and recourse must be had to that instrument to ascertain its extent. It cannot be a safe or salutary rule to allow a contract to rest partly in writing, and partly in parol. Wherever it is reduced to writing, that is to be considered as the evidence of the agreement, and every thing resting in parol becomes thereby extinguished.† The plaintiffs must, therefore, take nothing by their motion.‡

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Judgment of nonsuit.

† 2 Coines, 161.
5 Viner, 515. pl.
18. 517. pl. 26.

‡ 2 Coines, 48
Seixas
Woods.

(a) See *Laws of the U. S.* vol. 2. p. 131. Cong. 1. sess. 2. c. 1. *Abbott on Ship.* 3d edit. 42, 43.

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CAREW against OTIS.

C. and D. claimed money in the hands of O., C. brought his suit against O., who defended the suit at the request of D. The attorney of C. entered into a compromise with the attorney of D. and O., and the suit was discon-

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tinued; after which O. paid over the money in his hands to D. C., afterwards finding a defect in the securities delivered to him, as part of the conditions of the compromise, brought his action against O. for a breach of his promise, that the securities were valid. It was held, that O. was a mere stakeholder, and the agreement about the compromise must be considered as made between C. and D., and that having paid over the money to his principal, O. was no longer liable

THIS was an action of *assumpsit*. The cause was tried at the *New York Sittings*, in *April*, 1805, before Mr. Justice *Thompson*.

In the year 1801, the plaintiff in this suit, who resides at *Norwich*, in the state of *Connecticut*, commenced an action in this court for money had and received to his use. The money claimed in that action by the plaintiff arose out of the sale of a ship belonging to one *Kelly*, of *Norwich*, and mortgaged by him to the plaintiff, and afterwards mortgaged to *Dewitt and others*, in *Connecticut*. *Dewitt and others* also claimed the money in the hands of the defendant, *and the suit brought by the plaintiff was defended by their request, and for their benefit. This fact was known to the plaintiff. When that cause was called on to trial, in *March*, 1802, and the jury were sworn, the parties entered into the following compromise: The plaintiff agreed to receive, for the amount of his claim, a part in cash, and for the residue, the two promissory notes mentioned in the declaration in this suit, which notes had been previously passed away by him to *Kelly*, and formed a part of the sum for which the mortgage was given to the plaintiff, and were then to be returned to him. The plaintiff was also to be paid the costs of suit, and be reimbursed the counsel fees he had advanced. The notes were thereupon delivered to the plaintiff, who, on examining them, objected that they appeared to have been altered. Upon which a Mr. *Lanman*, who attended the trial as the agent of *Dewitt and others*, replied, that the notes were in the same condition as when the plaintiff parted with them, and that nothing had been done to invalidate them; and the attorney for the defendant observed, that it was to be so understood. The plaintiff then accepted the notes, and the jury were discharged. The other terms of the compromise were afterwards fulfilled by the defendant. The notes in question had never been in the hands of the defendant, but were brought to *New-York* by *Lanman*, the agent of *Dewitt and others*. At the time of the compromise, the makers of the notes were understood to be in embarrassed circumstances, and the notes of little value. The defendant had no interest in the money for which he was sued by the plaintiff, but held it subject to the contending claims; and this was known to the plaintiff. The settlement was made with the plaintiff by the attorney of the defendant and *Lanman*, without consulting the defendant about the terms of it. The defendant, afterwards, paid over to the other claimants in *Norwich*, the balance of money remaining in his hands. After this settlement, the plaintiff gave notice to the defendant, that the notes had been altered and paid, and

demanding the payment of them. The defendant, with the consent of *Dewitt and others*, then offered to rescind the agreement for the compromise, and to place the plaintiff in the same situation in the original suit, as he was when the compromise was made. This offer, made before the commencement of the present suit, was refused by the plaintiff. The notes had been altered while in the hands of *Kelly*; (a) and the only evidence of any payment was, that *Kelly* had charged them against the makers, in his account with them; but there remained due to *Kelly*, from the makers, on that account, a balance greater than the amount of the notes. One of the makers resided at *Demerara*, and was reputed to be in solvent circumstances.

On the evidence of the above facts, a verdict was found for the plaintiff for five hundred dollars, with liberty to move the court for a new trial on a case made.

Boyd, for the defendant. 1. The defendant in this case acted as the *agent* of *Dewitt and others*, between whom and the plaintiff, the agreement must be considered as virtually made. The money having been paid over by the defendant to his principals, before any notice of the plaintiff's claim on account of the notes, he was completely exonerated. Having acted with perfect good faith, in regard to the agreement, he cannot, after having paid over the money to the persons entitled to receive it, be made liable to the plaintiff, though there may have been a mistake about the notes. In *the case of *Buller v. Harrison*,† the question was, whether the placing the money received by the *agent* to the account of his *principal*, was *paying it over*. It is clear from the whole case, that, had the money been paid over in fact, no action would have lain against the agent. Indeed, Lord *Mansfield* observes, that if an agent pay over money which has been paid by mistake, he does no wrong, and the plaintiff must call on the principal.

2. The alterations or additions to the notes were not such as to invalidate them. In regard to the first note, the alteration was such as any holder was authorized to make. In the second note, the words added, made the parties *sureties*. This alteration does not affect the rights of the holder of the note. Being made by the parties themselves, they never would be allowed

(a) The notes were in the following words. The alterations made in red ink, are here printed in *italics*.

I.

\$1,000. Norwich, February 17, 1798.
For value received we promise, jointly and severally, to pay unto Joseph Carew, the sum of one thousand dollars on demand, with interest from the 27th day of July until paid. Witness our hands.

KELLY & BENJAMIN.

As *sureties*. { HUGH KELLY,
ELIAS LORD.

II.

We *Kelly and Benjamin* as *principals*, and *H. Kelly and E. Lord* as *surety*. In thirty-four days from date, we the subscribers jointly and severally promise to pay to Joseph Carew or order, four hundred and thirty-four dollars; interest after due. Witness our hands, &c.

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† *Comper*, 566

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to object to the payment on that ground; for this would be permitting them to take advantage of their own wrong.

3. But it is said, that the notes had been paid. That was not the case, unless the delivery of them to one of the makers was to be deemed a payment; the charging them in the books of account of *H. Kelly*, cannot amount to a payment, nor extinguish them, so as to prevent the *payee* from maintaining an action upon them whenever they come again into his possession. As to the delivery of the notes by *Carew* to *Kelly*, that was a fact which the plaintiff must have known at the time of the agreement, and against the effects of which it cannot be supposed that the defendant intended to stipulate; nor ought the plaintiff to be allowed to avail himself of that circumstance, as the ground of the extinguishment of the notes.

T. L. Ogden, for the plaintiff. 1. The defendant was in fact a debtor to the plaintiff, for money had and received to his use; at least, he was a *stakeholder* liable to the contending parties. This liability was a sufficient consideration for the agreement, and made it binding upon the defendant. The agreement was made by the attorney of the defendant; and was confirmed and ratified, by his paying the money and costs to the plaintiff in pursuance of the agreement. That he afterwards paid over the balance in his hands, does not *vary the case; if he thought proper to enter into this engagement with the plaintiff, the subsequent payment of money held by him, cannot release him from his responsibility on an express promise. Having a full knowledge of the plaintiff's claim, he has parted with the money in his own wrong.

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2. Can a note, after being altered or defaced, be again negotiated so as to give the holder a right of action upon such note? The alterations are material, for they change the characters of the parties, making some liable merely as sureties. A note, after it has once been issued, and returned again to the maker, cannot be altered, and again issued as a valid note.

3. These notes, after they came into the hands of *Kelly*, were charged in account, and the items merged in a general balance. After charging them in account, and making memorandums and alterations on them, they must be considered as settled; and it was a fraud, after this concurrent adjustment of the parties, to put the notes again into circulation.

4. The notes having thus been invalidated, there is a breach of the promise and undertaking of the defendant, for which he ought to be made liable to the plaintiff. The only question is, whether the notes were invalidated; for that is the ground of the action; if they were, the plaintiff must have judgment.

Harison, in reply. The promise or agreement of the defendant was, that the notes should remain valid evidence of a debt or account. If the power of recovering on the notes has been defeated, it was by the act of the plaintiff himself, the result of

prior transactions between the parties, of which the defendant was perfectly ignorant. But there is nothing on the face of the notes, and the transactions relating to them, that shows them to be invalidated. It was not intended by the parties to stipulate as to any immaterial alteration that could not vitiate the notes. That they have been in the hands of *Kelly*, does not affect their validity. The inserting the word *sureties* does not change their essence, or impair the notes. All the makers remain equally responsible to the holder as principals; the insertion of the words in red ink was merely to denote the situation of *their rights between themselves, but could not vary or impair the rights or remedies of a holder. The fact that *Kelly* had charged the notes in account with the makers, does not amount to a payment; he might apply the items of his own account as he pleased; besides, the balance was still in their favor.

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But the defendant was a mere stakeholder. The compromise was made by the real parties in controversy; and the defendant paid over the money pursuant to their directions. He had no interest in the money; it would be extremely hard that an agent or stakeholder should be made liable when he has parted with the money, in consequence of an arrangement between the contending parties. The offer to rescind the whole agreement, and put the plaintiff in the situation in which he originally stood, ought to have some weight in favor of the defendant. The presence of the attorney of the defendant, or his conversation, ought not to bind the defendant, for he was, in fact, the counsellor of *Lanman*, who was the agent of *Dewitt and others*, the real party in the controversy.

THOMPSON, J., delivered the opinion of the court. The facts stated in this case are not sufficient to sustain the present action. The defendant was a mere stakeholder of the money, which was the subject of the former suit. The plaintiff, who had an interest in the money, settled the dispute with respect to its disposition; this was done without the agency or interference of the defendant; and on such compromise he paid over the money, according to the terms of the settlement, which must be considered as done pursuant to the direction and orders of the parties interested in it, and as equivalent to a payment to themselves. The defendant having had no agency in the compromise, it is perfectly immaterial, as it respects his liability, whether or not the plaintiff was deceived or defrauded in that settlement. No notice was given to the defendant of the pretended alteration of the notes, until after he had paid over the money, and it would be unjust in the extreme to make him responsible for the negligence of the plaintiff, or the misrepresentations of *Lanman*, with whom *he made the settlement. If *Lanman* could be considered the agent of the defendant, the subsequent conduct of the latter, in paying over the

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money, pursuant to the compromise, might be deemed a ratification, and make him responsible for the fulfilment of the contract; but every part of the case excludes the idea of the defendant's having had any interest in the controversy. He was not only, in fact, a mere nominal party, but this was known to, and well understood by, the plaintiff. The case states explicitly, that the first suit, which was the subject of the settlement, was defended at the instance and for the benefit of *Dewitt and others*, and that this was known to the plaintiff. *Lawman* acted as the known and avowed agent of *Dewitt and others*. The plaintiff contracted with him in that capacity; and if the contract has not been complied with, a remedy must be sought either against the principals or their agents, and not against one who had no concern in the transaction. This objection, without examining any of the other points, goes to the whole merit of the plaintiff's claim, and would entitle the defendant to judgment; but according to the terms of the case, we can only set aside the verdict, and award a new trial.

New trial granted.

NANCY JACKSON *against* ARCHIBALD JACKSON.

A citizen of this state married a wife in this state, and after living together for more than a year, the wife left her husband, and went into the state of Vermont, and there

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obtained a divorce under the laws of that state, on the ground of ill treatment and severe temper, and then returned to this state, where she has since resided. In an action brought by the wife against the husband for *alimony*, adjudged to her by the decree of the court in Vermont, which granted the divorce, it was held, that the

THIS was an action on the case, brought on a judgment or decree of the Supreme Court of Judicature of the state of Vermont. Plea, *non assumpsit*.

The cause was tried at the circuit held at Albany, the 17th October, 1805, before Mr. Justice Thompson. The plaintiff produced a copy of the decree of the Supreme Court of Vermont, duly authenticated, by which it appeared, that the plaintiff had exhibited a petition to that court, stating her marriage with the defendant, of Canaan, in the county of Columbia, in this state, on the 21st September, 1800; and that, on account of the ill treatment and abuse she received from the defendant, who beat her, and threatened her life, and his severity of temper, it was impossible that she could live with him, &c., praying a divorce. On the 1st Tuesday of February, 1803, the court decreed as follows: "Upon hearing the allegations in the said petition contained, and the evidence adduced in support thereof, and the arguments of counsel, it is considered by the court here, that the prayer of the said Nancy's petition be granted, and that the said Nancy be divorced from all and singular the obligations she is under, by virtue of the marriage covenant between her and the said Archibald; and it is further ordained, adjudged and decreed, that the said Nancy do have and recover of the said Archibald fifteen hundred dollars, for her *alimony*, of which she may have execution."

It was proved, on the part of the defendant, that he and the plaintiff were lawfully married at *Canaan*, in this state, in *September*, 1800; that they lived together until the winter of 1802; that in *October*, 1802, the plaintiff went to *Vermont*, and declared, at the time, that she went there for the purpose of obtaining a divorce from her husband; that in the month of *April*, 1803, she returned to *New-York*, and has ever since resided within this state; it appeared, also, that the defendant was a citizen of this state; that both parties, before their intermarriage, were inhabitants of this state, and have continued to reside here, except the plaintiff, for the time she was absent in *Vermont*. The present action was brought to recover the sum decreed for alimony by the court of *Vermont*, and a verdict was taken, by consent, for the plaintiff, subject to the opinion of the court on a case containing the above facts. It was agreed, that the printed laws of *Vermont* should be read, on the argument, as the laws of that state.

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domicil of the party was not changed by her going and residing in *Vermont*; that such conduct was an evasion of the law of this state, which does not allow of a divorce, except for adultery: and that no action could be maintained on such a decree.
(a)

Woodworth, Attorney General, for the plaintiff. If the court had not already decided that a judgment in another *state was not conclusive, I should feel disposed to question that doctrine.

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[Court. That question is settled.†]

The decree, then, is *prima facie* evidence of the plaintiff's right to recover. It cannot be impeached unless for some irregularity.

(a) *Borden v Fitch*, 15 Johns 121. *Pewling v. Bird's Executors*, 13 Johns. 192.

[Court. It appears from the case, that the judgment was regular. That point need not be argued.]

† 1 *Caines*, 460. *Hitchcock & Fitch v. Aicken*.

It is contended, then, that the court of *Vermont* was competent to pronounce the decree; and that the plaintiff is entitled to have the full effect of it here. The parties were before a court, in another state, having power to decree divorces. There is no objection of any want of jurisdiction, or of any irregularity in the proceedings of the court. There is nothing, therefore, in this case, to distinguish it from any other action on a judgment or decree of a foreign court, for the payment of a certain sum of money.‡

‡ See 3 *Caines*, 22. *Post & L. Rue v. Neafie*.

H. Bleecker, for the defendant. This, if not a difficult, is certainly a new case, and involves a question of great importance to the laws of this state, and to the interests of its citizens. The parties were inhabitants of this state; and the contract of marriage was made and solemnized here. The question is, Can a court of another state, or of a foreign country, dissolve a marriage contract under such circumstances? or will this court lend its aid to give effect to such a decree of a foreign tribunal? By the law of this state, no divorce can be obtained except for *adultery*.§ In *Vermont*, divorces are granted for slight causes, as ill treatment and bad temper. Here is a *conflictio legum*, and it remains to be decided, whether, in a mat-

§ *Laws of N. Y.* vol. 1. p. 94.

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† *Just. Inst.* 1.
2. 1. 1 *Bl. Com.*
43. *Huberus*,
lib. 1. tit. iii. n.
2. *de conflictu*
legum.

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‡ *Vattel*, liv. 2.
c. 8. § 101.

§ *Vattel*, liv. 2.
§ 107.

|| *Vattel*, liv. 1.
c. 9. § 212, 213.

¶ *Vattel*, *ib.* §
217, 218.

†† *Kames's*
Principles of
Equity, vol. 2.
p. 312. 354. 366.
Erskine's Insti-
tute of the Laws
of Scotland,
book 1. tit. 2. n.
16—18. *et seq.*

‡‡ *2 Bos. & Pull.*
229. *March*
v. Hutchison.
Bruce v. Bruce,
in a note. See
also *3 Dallas*,
133 to 169. as to
expatriation.

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§§ *Huberus*, lib.
1. tit. iii. *Ersk.*
Inst. vol. 2. p.

471. 581. 735. 786. *Kames's Prin. of Eq.* b. 3. c. 8. s. 1, 2, 3, 4. *Roll. Abr.* 43. *Hargrave's Co. Litt.* note, 206. a. 2 *Burr.* 1077. 4 *Term Rep.* 189. 2 *H. Black.* 402. 3 *Term Rep.* 454. 4 *Term Rep.* 466. 3 *Bos. & Pull.* 38, 39. 1 *East*, 6. 1 *Cooke's B. L.* 176. *Loft*, 1. *Somerset v. Stewart.*

ter of so much consequence to the morality and happiness of the people, we are to be governed by the laws of another state, or by those of our own. The municipal law of a state does not extend beyond its territory, and has authority only over its own citizens or subjects. *Jus civile est quod sibi populus constituit.*† It is true, that *Huberus*, in his second axiom, classes all those who are within the territory, whether their residence be temporary or permanent, as subjects; but this must be understood only *in relation to the general laws made for the preservation of good order, and which have no relation to the title of citizen or subject, properly speaking.‡ A citizen or subject, who absents himself for a time, without any intention to abandon his country, does not lose the character or privileges of a citizen.§ The permanent inhabitants, and native citizens, are always distinguished from strangers, or temporary residents.|| It is the *domicil*, or fixed habitation, that makes a person a subject or a citizen.¶ Foreign laws, judgments, or decrees, have no authority *extra territorium*.†† Now the *domicil* of these parties was fixed, and always continued, in the state of *New-York*. The defendant did not go into *Vermont*, and the plaintiff went there avowedly for the purpose of evading the laws of this state; she was not even there at the time the petition was presented, and, though absent a few months, she has returned and resided in this state ever since. The law of *Vermont*, at that time, did not require even a residence of either party, in order to obtain a divorce. The domicil of the husband is the domicil of the wife. While the marriage contract continues, the wife can never be supposed to have a different domicil from that of her husband. Even had the husband gone into *Vermont*, his temporary residence there, while he had the *animus revertendi*, would not be considered as changing his *domicil*.‡‡ Will this court, then, sustain or give effect to the decree of a foreign tribunal, dissolving a contract of marriage between citizens of this state; a decree repugnant to the policy and morality of our own laws? In what cases is the *lex loci* to govern, and how far have the courts of one country carried their courtesy, in giving effect to the decrees of the court of another country? Though a general principle of convenience, in regard to the intercourse of mankind, has produced the general rule respecting the *lex loci*; yet every writer on this subject admits, that where the laws of one country are injurious to another, are repugnant to *morality* or *policy*, or are attended even with *inconvenience*, they are not to be considered as valid within a different jurisdiction.

*The cases on this point, to be found in the books, are numerous: they relate to *marriages*, *wills*, *bankruptcies*, *revenue*, *slaves*, and concern *religion*, *morality*, or *policy*.§§ *Huberus*

considers the case of young persons going from *Holland* into *Friesland*, to sanction their illicit intercourse by a marriage there, without consent of curators or guardians, and returning again to *Holland*, as a fraud and evasion of the law; and that such marriages are not valid. (a) So if a *Frisian* marries his brother's daughter in *Brabant*, and returns, the marriage is void. (b) But we shall probably be told of the *Scotch marriages*, and the decisions which have taken place in relation to them: but the court will recollect the history of those marriages, and the diversity of opinions which have been entertained as to their effect.† A reference to the authorities cited will show how this rule about the operation of the *lex loci* has been limited. The cases in which it has been allowed, have arisen either from *comity* or *necessity*; and relate to objects harmless or innocent, and which can be attended with no inconvenience or injury. Such are the cases in regard to *interest*, *bills of exchange*, *forms of oaths*, &c. The warmest advocates in support of the decisions of foreign courts, admit, that if the party claiming the benefit of the judgment of such courts applies to the courts of his own country to enforce such judgment, it is completely open to examination, and subject to the laws of the latter place.‡ *In executione sententiæ alibi latæ, servare jus loci in quo fit executio, non ubi res judicata est.*§ The party, by bringing his action on this judgment, before a court of this state, has submitted to its laws, and the rules of decision adopted here.

Again, there is a material difference between giving effect to the law of another country, when it is in support of *a just and *bona fide* contract, and when it is to destroy such contract, or discharge the parties from its obligations. If the court will not allow the discharge obtained by a debtor under the bankrupt or insolvent laws of another state, to defeat the right of his creditor on a contract made here,|| *à fortiori*, they will not permit so important and sacred a contract as that of marriage to be dissolved by the laws of another country, while the parties remain citizens of this state. There cannot be a stronger case for excluding the operation of the *lex loci*. It is unnecessary to dwell on the importance of the marriage contract, and its extensive effects on all the various relations of society. If this decree be sustained, the consequence will be, that we shall be governed by the laws of *Vermont*, instead of our own laws; but *magis est in tali conflictu, ut jus nostrum quam jus alienum servemus*.¶ If, however, we are bound implicitly to

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† *Hargrave*'
Co. Litt. 79. b
note. Bull. N.P.
113. 2 H. Bl
145. *Ilderton v*
Ilderton.

‡ See the opinion
of Ch. Baron
Eyre, 2 H. Bl.
410.

§ *Sandius, apud*
Huberus, lib. 1.
tit. iii. § 7.

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Kames's Prin.
of Eq. b. 3. c. 8.
s. 6. See also
1 *Caines*, 412.
Nash v. Twpper
On that principle, this court decided, that where a party sues in this state on a contract made in another state, our statute of limitations is a good plea in bar, though there be no such prescription in the state where the contract was made.

|| 3 *Caines*, 154.
Vanraugh v.
Vanarsdalen, 1
East, 6. 5 *East*,
125.

¶ *Huber. loc. cit*
n. 11.

(a) *Ego ita existimo, hanc rem manifeste pertinere ad eversionem juris nostri, ac ideo non esse magistratus hanc obligatos, e jure gentium, ejusmodi nuptias agnoscere et ratas habere. Multoque magis statuendum est, eos contra jus gentium facere videri qui civibus alieni imperii sua facilitate jus patriis legibus contrarium, scientes volenter impertiuntur.* Hub. lib. 1. tit. iii. n. 8.

(b) *Si Frisius cum fratris filia se conferat in Brabantiam, ibique nuptias celebret, huc reverens non videtur tolerandus; quia sic jus nostrum pessimis exemplis eluderetur.* Hub. lib. 1. tit. iii. n. 8.

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adopt the decrees of the courts of *Vermont*, and to give them effect within this state, the marriage ties, which should be permanent and indissoluble, except by death, or the criminality of either party, may be broken for the slightest cause. The wife may elope and be divorced before the husband can know where she is, or have it in his power to reclaim her. The laws of *Vermont*, to-day, authorize divorces for ill treatment and severity of temper; to-morrow, they may adopt the *Roman law*, and grant divorces, because the wife had been at a play, or been seen in the street with her head uncovered. The consequences, too, not only as to the peace and happiness of families, but as it respects the rights of property in the husband, and the interests of creditors, which must be affected by a divorce, deserve serious consideration.

Notwithstanding the political compact that connects the *United States* as a federal republic, the several states must be considered as distinct and independent sovereignties, governed by different laws and customs. The reputation and prosperity of this state is greatly owing to its being governed by that excellent system of *English common law*, adopted by our ancestors, and to the wise and regular administration of justice connected with it. Every attempt to subvert this system ought to be discountenanced. Every violation of the independent jurisdiction of the state, ought to be resisted; for the service of process, and notices, issuing from the courts of another state, is an infringement of the jurisdiction of this state.†

Laws of N. Y.
vol. 1. p. 166.
Kirby's Rep.
119.

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Woodworth, in reply. I shall not controvert the principles or authorities which have been adduced on the other side with so much learning and ingenuity. It is sufficient to show that they do not apply to the present case. It seems to have been attempted to prove, that the rights and incidents of marriage are *local*, and do not accompany the parties wherever they choose to reside. But there is nothing so peculiar in the nature of this contract, as to render it perpetually subject to the law of the place where it was originally made. Suppose the case of parties married in *France*, and that by the laws of that country the contract could not be dissolved for any cause whatever, (a) and they should afterwards come to reside here, and be made citizens under the naturalization law; will it be contended, that if either of them commit *adultery* in this state, that a *divorce* cannot be granted, merely because no divorce would have been allowed in *France*? On the contrary, this contract is emphatically *personal*; its rights are to be enjoyed, and its duties performed, wherever the parties happen to reside. Whenever they change their residence, they carry with them the contract, with its incidents, which is thus transitory

(a) This was the law in *France*, before the revolution. See *Pothier, Traite du C'ontrat de Mariage*, part 6. c. 1. art. 1.

and subject to the laws of the place where the parties are found. It is not denied, that if the court of *Vermont* had pronounced this decree, without having the parties before them, it would be void. But it appears, by the exemplification of the record, that the parties did appear before the court by counsel. The *domicil* of the parties is immaterial. It is sufficient that they were within the jurisdiction of the court; for so it must be intended from the record.

*Again, the statute of this state does not exclusively confine the cause of divorce to the fact of adultery. It is not prohibitory, but provisory. Every state may make such laws as may be thought best, and the persons found within its jurisdiction will be subject to them. Different countries admit different causes of divorce.† There is nothing in the natural or revealed law that prohibits divorces. If this decree militate against any statute or law of this state, or against *religion, morality or policy*, or is *injurious* to society, it will not be entitled to the aid of this court to carry it into effect. If the cause of divorce should at any time appear to be trivial or improper, as has been supposed, the courts of this state will not be bound to sanction it. It will be sufficient, however, to decide upon such a case whenever it arises. Though this be not a case of *adultery*, yet the causes of divorce are such as would justify the separation of the parties, at least, if not a dissolution of the marriage contract. If the court should be of opinion, that there was sufficient grounds for a divorce *à mensa et thoro*, they may support this decree so far as to permit the plaintiff to recover *alimony*; for a decree may be affirmed in part, and reversed in part.‡

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† *Montesquieu*,
liv. 15. c. 14
15.

‡ *2 Bac Abr*
268.

SPENCER, J., delivered the opinion of the court. After stating the facts in the case, he proceeded:

The laws of *Vermont* are to be considered as part of the case; it appears that the Supreme Court of that state had jurisdiction given to them, by a statute of the 28th of *February*, 1797, to grant bills of divorce, for several enumerated causes, among which is intolerable severity, and to allow alimony. By another statute, passed the 12th of *November*, 1802, it is provided, that no bill of divorce shall be granted, unless one of the parties has resided within that state one year previous to the granting of such divorce; the latter act was not to take effect until from and after the 1st day of *February* succeeding its enactment. By a reference to the calendar of the year 1803, it appears that this decree was pronounced on the 1st day of *February*, 1803. By the terms of the last statute, that day is excluded, so that the *broad question arises, whether the judgment in this case, under the circumstances attending it, can be deemed obligatory on the defendant, so far forth as to sustain the present action.

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The case of *Hitchcock & Fitch v. Aicken* must, as respects § 1 *Coxnes*, 460.

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this court, be an authority for saying, that a judgment obtained in a sister state is liable to be impeached in a suit brought on it here, notwithstanding there may have been a full and a fair trial in the original suit. And so far it quadrates with this case, for here the defendant appeared, and made his defence, and thereupon the court in *Vermont* pronounced the decree in question.

The case being thus open for examination, the question at once arises, how far this court will lend its assistance to carry into effect, between its own citizens, a judgment of a foreign court, where the plaintiff has resorted to that court, with the avowed object of gaining relief in a case not provided for by our laws, and against the policy of them. I say, against the policy of our laws, because our own legislature having authorized divorces but in one case, intolerable severity of treatment does not warrant a divorce. In delivering the judgment I have formed in the present case, it is not to be understood that I mean to impugn the principle, that proper deference is due to the decisions of the courts of justice in a neighboring state, in a case properly before them, and when they do not encroach on the rights of other states.

We are not called on, in the present case, to pronounce on the legal effect of the divorce granted by the Supreme Court of *Vermont*. Here is a plain attempt by one of our own citizens to evade the force of our laws. The plaintiff, to obtain a divorce, which our laws do not allow, instituted her proceedings in *Vermont*, whilst she was an inhabitant, and an actual resident, of this state, and while her domicile continued within this state; for she was incapable, during her coverture, of acquiring a domicile distinct from that of her husband.† The plaintiff having acted with a view of evading our laws, it would be attended with pernicious consequences to aid this attempt to elude them.

† 9 Fed. juv
787.

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*It may be laid down as a general principle, that whenever an act is done *in fraudem legis*, it cannot be the basis of a suit in the courts of the country whose laws are attempted to be infringed. The cases of *Briggs & Lawrence*,‡ and *Clugas & Penaluna*,§ support this opinion, without going beyond the point now submitted. The court are, therefore, of opinion, that judgment must be given for the defendant.

‡ 3 Term Rep.
454.
§ 4 Term Rep.
466.

Judgment for the defendant.(a)

(a) See *Smith v. Smith*, (2 Johns. Rep. 235.) *Thompson v. Ketcham*, (4 Johns. Rep. 285.) *Embree & another v. Hanna*, (5 Johns. Rep. 101.) *Warren v. Lynch*, (5 Johns. Rep. 239.)

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THIS was an action on a policy of insurance. The cause was tried at the *New-York Sittings*, the 17th day of *June*, 1805, before Mr. Justice *Tompkins*.

The policy was in the usual printed form of a policy on cargo; and the blank was filled up with the following words: *At and from Cumana, Spanish Main, to New-York, with liberty to touch at Curaçoa or St. Thomas, in and with the schooner RISING-SUN, on profits*; then followed the printed words, "on all goods and merchandizes laden, or to be laden, &c., the said goods and merchandizes, for so much as concerns the assured and assurers in this policy, are, and shall be, valued at" 2,500 dollars; to which amount the policy was underwritten. The policy, interest and preliminary proofs were admitted.

The broker was called to prove that it was the usual practice, as there were no blank policies on profits, to take a blank policy on cargo, to fill it up in the same manner the present policy had been, and to insert the valuation of the subject insured, without making any alteration in the printed words; that this valuation is always understood to refer to the premises insured, whatever may be the printed words in other parts of the policy; that at the time the defendant underwrote the policy in question, it was stated to him that the profits were valued at 2,500 dollars, to which he assented by subscribing his name; and that the policy was so filled up with the intention of expressing the value of the profits, as agreed on between the parties. This evidence was objected to on the part of the defendant, but was admitted, and the question as to its admissibility was reserved. The vessel sailed from *Cumana* with a cargo of cocoa and hides, in *October*, 1800, and was captured on the 10th of *October*, by a *British* privateer, and carried into *Bermuda*, where, on the 5th of *November*, she was libelled in the Vice-Admiralty Court. On the 24th of *December*, a decree of restitution was made, on payment of costs and expenses to the captors; and, in *January*, 1801, the vessel with her cargo arrived at *New-York*. The cargo had been insured in *New-York*, by the *Columbian Insurance Company*, for the same voyage, and after the capture, the assured, on the 22d of *November*, abandoned to the assurers, who accepted the abandonment, and paid as for a total loss. An abandonment on the present policy was made about the same time. The cargo, on its arrival, was taken possession of by the assurers, and sold at auction for their account, to a considerable profit. The jury found a verdict for the plaintiff, for a total loss.

A motion was now made to set aside the verdict.

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Where a printed blank policy on cargo was used, and the blank filled up for an insurance on profits, and the valuation in writing, when taken in connection with the printed words, was a valuation of the goods, and not of the profits, it was held, that *parol* evidence was inadmissible to explain the intention of the parties, there being no ambiguity in the words as they stood. Every policy on profits

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S. Jones, for the plaintiff. 1. Though, by the grammatical construction of the words, as they stand in this policy, the valuation refers to the *goods*; yet, from the evidence of the broker, as well as from the apparent object of the whole instrument, it must have been the intention of the parties to have valued the profits only. It would be absurd to apply the valuation to the goods, for the profits were the thing insured; this would make the goods and profits of the same value. Now, it appears that the goods at *Cumana* were worth 14,000 dollars.

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*[LIVINGSTON, J. There can be no doubt as to the intention of the parties; but can parol proof be admitted to explain or vary a written instrument?]

Parol evidence was admissible to show the practice in filling up such policies. The evidence does not destroy nor vary the contract; it merely explains the instrument so as to give it meaning and effect.

[LIVINGSTON, J. Can there be an *open* policy on profits?]

Policies on profits always are, and necessarily must be, valued. Where the *subject-matter* is clearly set forth in an instrument, the other expressions are to be taken in reference to that subject-matter, which, in case of doubt or ambiguity, is to govern in ascertaining the meaning of particular expressions. Here the *subject-matter* was profits, and referring the valuation to that, the policy, otherwise ambiguous or absurd, is made clear and intelligible. These instruments are always construed liberally, according to the usage of merchants, and in favor of the assured.†

† *Marshall*, 164.

2. Supposing this to be an open policy, enough appears in the case to show a loss to the amount expressed in the policy. But every policy on profits, *ex necessitate rei*, must be valued, otherwise it would be extremely difficult, if not impossible, to ascertain the amount to be recovered. By the decision of this court in the cases of *Abbot v. Sebor*, and *Tom v. Smith*,‡ profits are declared to be an *insurable interest*, and may be abandoned. By the capture, there was a total loss, and the abandonment having been made before the restoration, the plaintiff's right to recover became vested, and is not to be defeated by any subsequent event. If profits, *eo nomine*, be a distinct insurable interest, as admitted in *England* and in our own courts, it follows, as a necessary consequence, that the party may abandon them separately, from the goods, and all the other incidents and effects of a distinct subject of insurance are attached to it, otherwise the separate insurance would be nugatory. It would be idle for the law to say, you may insure *profits eo nomine*, as a distinct interest, but you cannot abandon*and recover separately. If separate insurances be allowed on these several subjects, the principle must operate throughout, so as to give a full and complete effect to the separate contract. It may be, that an

‡ 3 *Cases*, 245.

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insurance on profits will, in effect, partake of the nature of a gaming contract; but this can be no objection while it remains lawful for parties to enter into such contracts. The *English* courts, to be sure, have so in themselves embarrassed in some late cases, in regard to separate insurances on vessel and freight, which have been severally abandoned; and have decided freight to be an inseparable incident of the ship; but this court, with very good reason, have determined otherwise.† The language of the assurer is, for such a premium I undertake that you shall not be prevented, by any of the enumerated perils, from gaining such a sum, as profit. If any inconvenience should result to the insurer on profits, on account of an abandonment to the insurer on the goods, as in regard to salvage, it is an inconvenience he is bound to foresee when he enters into the contract, and is not to prejudice the rights of the insured on such contracts. That is a question between the different underwriters on the different subjects.

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† *Davy v. Hall*
lett, 3 C. 21.

Pendleton, for the defendant. 1. The written and printed words of this policy are express and clear. If a mistake has crept into the contract, contrary to the intention of the parties, they must go into a court of chancery to correct it. It cannot be done here, by the explanation of witnesses. It is true, that if a part of the contract be printed, and a part written, and there be any inconsistency, the written are to control the printed words. But here there is no inconsistency. It is said, that the printed words were not altered; but surely, the insurer might and ought to have added written words to control their meaning.

2. In regard to policies on *interest*, the criterion of insurableness is the capacity of the insured to transfer to the insurer the benefit of *salvage*. Every act of the insured, therefore, which deprives the insurer of this benefit, is a violation or dissolution of the contract. By first abandoning *the cargo to the insurer on goods, he elects to receive his indemnity from him, and waives all claim on the insurer on the profits. If the goods be valued, profits may be included in the valuation, and thus a double indemnity might be obtained, on the principles contended for by the other side.

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[KENT, Ch. J. How do you distinguish this case, in principle, from that of *Davy v. Hallett*?]

Profits are, in their nature, inseparable from the goods. The owner has his goods, and the profits on them, after deducting the freight. In case of an abandonment to the insurer on goods, he would take all the profits arising from the sale of the goods. To any demand of the insurer on profits, he might answer, I know nothing of your contract, it is a matter *inter alios acta*, with which I have no concern. The *English* courts have decided that *freight* is an *inseparable* incident of the ship;

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† 5 East, 388.

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† Abbott, 162—
172. and the cases there cited.

§ 6 East, 316.
Hodgson v.
Glover. 2 East,
544. Barclays v.
Cousins.

though this court have thought otherwise, they may, consistently, and on just grounds, declare profits to be an inseparable incident of the goods. On this principle, the insured, who voluntarily abandons, and parts with the subject, must be considered as abandoning, also, all claim to the profits. To avoid any inconvenience of this sort, an agreement may previously be made with the insurer on goods, so as to save the insurance on profits. The party has it always in his power to secure his rights to profits, by keeping the goods, or by an agreement with the insurers, previous to an abandonment. The reasoning in *M Arthy v. Abel*,† though a case of freight, applies with great force, in this view of the subject, to the question now before the court.

3. The goods received and sold by the insurers on the cargo, did, in fact, yield a clear profit of 2,000 dollars. If we suppose a right to abandon to the insurers on both subjects, then the insured ought to account for the profits he has voluntarily transferred, or bear the loss. In this way, only, can be restrained in the arbitrary exercise of his right, and be compelled to do justice. Either *the insurers on profits ought to have recourse to the insurers on the goods, which is not allowable, or the insured, who has, by a voluntary act, deprived the insurer on profits of the benefit or this claim in case of salvage, ought to lose the benefit of the policy. There is nothing unreasonable, impracticable or unjust in this doctrine.

Hoffman, in reply. 1. The parol evidence to show the intention of the parties, and explain the policy, by the invariable usage, was admissible. It was not to contradict or defeat the instrument. This has been often done in the construction of a charter-party, where the usage of trade is resorted to in order to explain the meaning of words† used in that instrument.

2. Every policy on profits must be valued, otherwise the assurer might be made liable for the fluctuation of a market. The contract is, if the goods be lost, I will pay you what it is agreed you might have gained by their safe arrival. Insurance on profits, as well as on freight, is allowed in England;§ and though some difference exists between the courts of that country and this, in regard to the effect of these separate interests, yet the case of freight is perfectly analogous to that of profits; and the principle that has governed the decision of the one, ought to determine the other. Freight grows out of the ship; profits out of the cargo. The argument as to the loss of the benefit of salvage, in an insurance on profits, when the goods are abandoned, is equally applicable to a separate insurance on freight. This inconvenience must be foreseen by the insurer at the time he enters into the contract, and he must, therefore, sustain it. At the time the abandonment was made by the plaintiff, there was a technical total loss by one of the perils insured against, and that loss has continued unchanged by any

subsequent event The insured, in regard to the policy on the goods, has done no act that he was not authorized to do by the terms of his contract; and the act of abandonment on another and distinct contract, ought not to prejudice his right to a recovery against the present defendant.

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*LIVINGSTON, J., delivered the opinion of the court. As there is no contradiction between the written and printed parts of this policy, and no ambiguity in its terms, *parol* evidence cannot be received to explain the intention of the parties; nor ought the usage of merchants to be resorted to, where the language used is so explicit as it is here. It is an insurance on profits, and the goods from which the profits were expected are valued at 2,500 dollars. This valuation, it is said, was intended to be put on the profits, and not on the goods, and that printed policies on cargoes are generally used for these insurances. This may be so; but we must only look to what has been done, and not to what was intended. If the parties will not make use of a proper policy, nor make the necessary corrections in the printed forms which they do use, it is their own fault.

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There is another ground, however, on which the plaintiff may recover. Though the profits are not valued, yet every such insurance must, of necessity, be considered as a valued, and not an open policy; especially, if the goods themselves, as is the case here, are valued. If it were otherwise, it would be next to impossible to prove their value, as is done in regard to vessels and cargoes. In these cases, it is easy to show what the different subjects cost, but how are you to ascertain what is often imaginary and must depend on so many contingencies? It does not follow that a profit will be made if the cargo arrives; yet its loss would give a right to recover on such an insurance.

But admitting that this is to be regarded as a valued policy, it is said that the assured, by abandoning the cargo to its underwriters, has put it out of the power of the defendant to receive any salvage on the profits, and that, therefore, he has no right to recover in this suit. This is a dilemma which the defendant ought to have foreseen at the time of his subscription. He must have supposed there was a policy on the cargo, which, in case of disaster, would naturally be abandoned to those who had insured it. It is idle to complain of what must have been clearly his own understanding of the contract; nor is it reasonable in him to expect, *that for the purpose of recovering on a small policy, on profits, a merchant should, by not abandoning the cargo, forego his insurance on that subject. We have said in *Tom v. Smith*,† that an insurer on profits is entitled, as against the insured, to an abandonment; but what right he would thereby acquire against an insurer of the goods, was not then settled, nor is that point now before us. We mean only to decide that a double abandonment, as in this case, does not deprive him of his remedy on a profit-policy, and that,

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† 3 *Caines*, 246

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therefore, the plaintiff must have judgment. This decision conforms with our judgment in the case of *Davy v. Hallett*, where there was supposed to exist a similar conflict between the underwriters on the vessel and those on freight.

Judgment for the plaintiff. (a)

(a) See *Hewickson v. Margetson*, (2 East, 549. note.) where there was insurance on the imaginary profit of a cargo, and the vessel lost, but cargo saved, and sent to the port of destination; it was held, that plaintiff might recover for a total loss. But see *Hodgson v. Glover*, (6 East, 316.) The insured must show that if the goods had reached a market, a profit would have been produced.

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C., by his last will and testament, after charging his estate with the payment of a debt, providing for his wife, &c., devises his real estate to his four sons and a daughter *Elizabeth*, and then adds, "Further, my mind and will is, that if any of my said sons, *William, Jacob, Thomas and John*, or my daughter *Mary*, shall happen to die

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without heirs male of their own bodies, that then the lands shall return to the survivors, to be equally divided between them." It was held, that these words did not create an estate-tail, but a limitation over in fee to the survivors, on the failure of the male heirs. (a)

THIS was an action of *trespass*, originally commenced before a justice of the peace, in which a plea of title was put in, and was afterwards removed from the Court of *Common Pleas* of *Queens county*, by *habeas corpus*, to this court. By the pleadings, the title to the freehold was put at issue between the parties; and the cause was tried at the *circuit*, held in *Queens county*, on the 25th September, 1805, before Mr. Justice *Livingston*, when a verdict was taken for the plaintiffs, subject to the opinion of the court on the following case.

The *locus in quo* was a tract of meadow and beach, at *Rock-away*, in the town of *Hempstead*, known by the name of *Rock-away Beach*, which anciently belonged to *Richard Cornell* under whom the parties claimed title. The plaintiffs claimed under the will of *William Cornell*, son of the said *Richard*, as the legal representatives of the devisees of the said *William*, and the defendant claimed under the will of *Richard Cornell* the father of **William*, on the ground that the devise was *in tail*. The will in question was dated the 7th November, 1693. The testator first binds his estate for the payment of a certain debt mentioned, and directs, that if his executors did not pay the debt, that then his estate should be sold for that purpose, and the surplus divided among his four sons; he then devises to his son *William* and his heirs for ever, the premises in question, and after devising other real estate to his other sons and his daughter *Elizabeth*, *in fee simple*, and making provision for his wife and daughter *Mary*, he adds the following clause, "Further, my mind and will is, that if any of my said sons, *William, Jacob, Thomas and John*, or my daughter *Mary*, shall happen to die without heirs male of their own bodies, that then the land shall return to the survivors, to be equally divided between them. *William*, after the death of his father, entered on the premises in question, and afterwards, in the year 1742, by his last will and testament, devised the same to his sons *William* and *John*, *in fee*, and died without revoking or altering his will. The plain

(a) *Moffat v. Strong*, 10 Johns. 13. *Jackson v. Staats*, 11 Johns. 538. *Jackson v. Anderson*, 16 Johns. 382. *Jack-*

lives are, in regard to the premises in question, the legal representatives of the said *William* and *John*; and the defendant, and one *Peter Smith*, mentioned in the pleadings, are the legal representatives in the male line of descent of the heir at law of the said *William*, the elder son of *Richard*.

The will of *Richard Cornell* was set forth in the case, but the only question between the parties arose on the above clause. It was agreed, that if the court should be of opinion, that *William*, the son of *Richard*, did not take an *estate-tail* in the premises under the devise to him from his father, that then judgment might be entered for the plaintiffs; but if the court should be of opinion that an *estate-tail* was created by the said devise, then a new trial was to be granted, with costs to abide the event of the suit.

S. Jones, for the plaintiffs. If any technical ideas suggested by the words, "heirs male of their bodies," be discarded, *there can be no doubt, from the perusal of this will, that the testator never meant to create an *estate-tail*. All the other clauses in the will show that the testator had in contemplation an estate in fee simple. The first devises are in fee, and by the subsequent clause no more could have been intended than to designate the event, on which the contingency was to take place, and not to use words of limitation. The devise over is also to his daughter *Mary*, who is not named in the former clause, as well as to the four sons, to whom the several portions of the estate had been devised. Again, he devises all his estate for the payment of debts, and directs the surplus to be divided among his heirs, all which evidently shows that he had no idea of creating an *estate-tail*, with cross remainders, one of the most complicated estates known in the law. But do the words, "heirs male of their own bodies," necessarily, *ex vi termini*, create an *estate-tail*? Are they not rather to be understood as describing an event, on which the estate should be defeasible, that is, in case the devisees should die without leaving sons, or male children? The court will feel disposed, so far as the principles and rules of law will warrant, to consider this devise over as an executory devise, rather than as a limitation by way of contingent remainder. It is true, that if this devise over was on the indefinite failure of issue, the contingency would be too remote to render it an executory devise.† But a contingency, that if a person die without sons or male issue, would be sufficiently near and probable; and in this case the event must happen within the lives of some or one of the devisees, as the remainder is to the survivors, and not their heirs. If *William*, for instance, had a son, the event would happen, and the devise over would never take effect. In fact, the event did happen, for *William* had a son, under whom the plaintiffs claim. Thus, in the case of *Hughes v. Sayer*,‡ where there was a devise over to the survivor, in case

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son v. Billinger
18 Johns. 568
Lion v. Durtie,
20 Johns. 483
Wilkes v. Lion,
9 Cow. 333. Jackson
v. Thompson,
6 Cow. 180. Jackson
v. Christman,
4 Wend. 377.

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† 2 Fearne 4th
ed. p. 118

‡ 1 P. Wms. 633
2 Fearne. 190.

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† Cro. Jac. 509.

11 Roll. Abr.
334. 2 Fearnce,
18.

43 Term Rep.
143. 2 Fearnce,
206. note.

1 See also Roe
v. Jeffery, 7
Term Rep. 589.

¶ Opinions of
C. J. Wilmot, p.
354. 2 W. Bl.
728.

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†† 4 Term Rep.
294. Cooper v.
Collis. 2 Bos. &
Pull. 314. Bem-
field v. Wetton.
Opinions of C.
J. Wilmot, p.
274.

either devisee died without children, the testator was *held to mean, a dying without children living at the death of the parent, and consequently, that it was a good executory devise. The case of *Pell v. Browne*† is analogous to the present. The word *issue* instead of *heirs male*, does not vary the principle. It was the dying without issue, living *W.*, that induced the court to consider it not as a contingent remainder in *fee-tail*, but as a limitation of an estate in fee, by way of an *executory devise*. Again, in the case of *Hanbury v. Cockerill*,‡ a devise to *A. and B.* in fee, and in case either died before marriage, or attaining the age of 21 years, and without issue of their bodies, it was held that the sons took in *fee*, subject to a limitation to the survivor for life, in case of the contingency happening, and so an executory devise. In the case of *Porter v. Bradley*,§ the devise was to his *heirs and assigns*, and if he should die *leaving no issue behind him*, then a devise over, which was held a good executory devise. Lord *Kenyon*, on recognizing the former decisions on this point, considered the case of *Pell v. Browne* as the *magna charta* of this branch of the law.|| I am aware that words of limitation, as *heirs male* of the body, &c., in a subsequent part of a will, have been construed so as to control the words creating a *fee simple* in a former part; but this is always where the words of limitation are so clearly expressed that there can be no doubt of the intention of the devisor. And where the first part of the devise creates an estate *for life*, and the latter part an estate *in tail*, it will be so construed as to enlarge the estate. But it is impossible, on the principles of such a construction, to reconcile the introduction of the daughter *Mary* into this part of the will, a person having no estate devised to her, which could give operation and effect to an *estate-tail*.¶ Again, the notion of an *estate-tail* is inconsistent with the direction of the testator in the former part of the will, that his estate should be sold to pay his debts. The devise to pay his debts, and the power to sell, whether carried into effect or not, strongly indicate the intention of the testator. *It is a cardinal rule in the exposition of wills, that the intention of the testator should prevail, unless against some settled rule of law. Thus words are construed to be either words of *limitation* or *purchase*, or descriptive of the event, according as they best agree with the manifest intention of the testator.†† By adopting the construction contended for, full effect will be given to all the words in the will, and this clause will be made to harmonize with the other parts, in which the intention of the testator is expressed in words that do not admit of the possibility of a doubt.

Hopkins and Radcliff, for the defendant. The question is not whether the parties are to take by descent or purchase, for in whatever way they take, it must be by descent. The single point of inquiry is, whether the clause cited from the will

creates an *estate-tail* or not. After many particular devises, this general clause is introduced, which shows some method in the will; for the testator first parcels out his estate among the several devisees, and then, by the general clauses, declares what kind of an estate they shall hold. The rules of construction in regard to wills are familiar, and founded in good sense.† One of these rules is, that where there are two clauses repugnant to each other, the last must stand.‡ Another and leading rule is, that the whole instrument is to be taken together, *ut res nagis valeat quam pereat*. By the construction contended for on the part of the plaintiffs, the whole cannot stand. In the first clause, a *fee simple* is created, in the latter an *estate-tail*. The words creating a remainder over can have no effect, unless an *estate-tail* be created. If we suppose a *fee simple*, not only the words *heirs male of the body* must be rejected, but the remainder also must be void. If both clauses are taken together, they necessarily import an *estate-tail*. A *fee simple* is first created, which is afterwards changed into an *estate-tail*. This *estate-tail* is expressly created, rather than by implication. It is not an estate for life, and for want of heirs of the body, with a remainder over; but the estate continues a *fee* as long as there are *heirs male of the body*, but ceases to be a *fee* on failure of such *heirs. Again, an *estate-tail* may be created by implication, and will support a remainder.§ And where words in a former part of a will give an estate in *fee simple*, and words in the latter part import an *estate-tail*, the court consider them as creating an *estate-tail*.|| It is a settled and invariable rule, that where a contingency is limited to depend on an estate of freehold, which is capable of supporting a remainder, it shall never be construed to be an executory devise, but a contingent remainder only.¶ This doctrine was laid down by Lord *Hale*, and has been uniformly adhered to ever since. The reason why a devise over to survivors is considered as an executory devise, is, that after a *fee simple*, no remainder can be created except by way of *executory devise*. Here there is an estate created, capable of supporting a remainder over; and according to the rule established by Lord *Hale*, it must be considered as a contingent remainder, and not as an executory devise. Executory devises were introduced in favor of wills, and are an exception to the general rules of common law, as to the creation of estates. It is a devise in *fee*, but upon the happening of a particular event, limited to another description of heirs. Courts will never consider these estates as executory devises, unless compelled by the common law doctrine, that prevents the creation of a remainder in *fee*, after a *fee*.††

It is said, on the other side, that dying without *heirs male of his body*, must be construed as dying without *heirs living at the time of his death*. But though, as to *personal estates*, courts have been inclined to adopt this rule, yet, in regard to real estates, it is otherwise.‡‡ It is true, that in some modern

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‡ 2 Bl. Com
379. Co. Litt
112. b.

‡ 1 Vesey, 25. 6
Term Rep. 314

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§ Comyn, 372
Wallerv. Drew

|| Douglas, 757
Cro. Jac. 696
Conceper, 410. 6
Term Rep. 314
1 Vesey, 25.

¶ *Purefoy v. Rogers*, 2 *Saunders*, 388. and see the learned notes of Serjeant *Williams*. See also 4 *Mod.* 284. 3 *Term Rep.* 765. *Douglas*, 759. 2 *Vesey*, 616. 2 *Fearne*, 4th ed. by *Powell* 1, 2. 12. 14. 203 and the notes

†† Comyn, 372

‡‡ *Fearne*, 194
197.

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† Porter v.
Bradley, 3 Term
Rep. 143.

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{ See 4th edit.
of *Fearne*, vol.
ii. and the notes
of *Powell*, from
p. 118 to 299,
and notes 197.
199. 1 P. Wms.
665.

§ 6 Term Rep.
314.

|| 2 Atk. 308.
314.

¶ Douglas, 504.
*Roe v. Fon-
neau*, 1 Bro. C.
C. 190.

†† 2 Vesey, 180.
611. *Cowp.* 234.
See also 8 Vin.
Abr. p. 212. §
11. 215. § 9. 259.
§ 2. 269. § 9.
272. § 2.

†† *Fearne*, 204
note of *Powell*.

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§§ *Cowper*, 235.
*Brown v. Black-
ett*.

cases, this distinction has been questioned, particularly by Lord *Kenyon*,† who thought it *strange* that there should be a difference, in this respect, between a devise of real and of personal property. But this is clearly an innovation on the ancient rules, which his lordship professed to support when first called to the bench, unless he laid stress on the words *leaving no issue behind him*. This remark, besides contradicting all antecedent notions, is expressly contrary to the opinions of two distinguished *elementary writers, *Fearne* and *Powell*,† and being since the revolution, can have no binding authority on this court, more particularly in regard to a will made near a century ago. Besides, in the case of *Daintry v. Daintry*,§ where it was decided, on a devise of *real and personal* estate, that the devisee, by the same words, took an *estate-tail* in the real estate, but in the personal estate for life only, or if he had children, absolutely, otherwise it went to the uncle, by way of executory devise, Lord *Kenyon* seems to have forgotten his former observations about there being no distinction between real and personal property. Reasons of public policy may induce a different decision in regard to limitations of personal property, which do not apply to real estates. All the cases cited on the other side, except that of *Porter v. Bradley*, in support of their doctrine, are those of devises of *personal* property. In the case of *Beauclerc v. Dormer*,|| though a devise of personal estate, Lord *Hardwicke* observes, that none of the authorities cited came to the point, that *ex vi termini*, *dying without issue*, was to be confined to dying without issue living at the time of the death of the first taker. *Issue* is considered as a *nomen collectivum*, and the words *dying without issue* always carry an *estate-tail*.¶ The books are full of authorities to this point. So a devise over “to nephews *moietively*,” was held to create an *estate-tail*,†† and many similar cases might be cited. The case of *Roe v. Scott*, in the Common Pleas, cited by Mr. *Powell* from the MS. of Mr. *Fearne*, is very strongly in point. The testator, after devising his lands to his three sons, and his *heirs and assigns for ever*, and charging the same with the payments of various legacies, then added, “My will and mind is, that if either of my three sons shall depart this life *without issue of his or their bodies*, then the estates of such sons shall go to the survivors or survivor; notwithstanding there were many circumstances tending to show that the testator meant to create an estate in *fee simple*, it was held that the words created an *estate-tail*.††

The clause as to the payment of debts is a mere naked power, and the devisee will take the estate subject to that *power. Charging an estate with the payment of debts, does not affect the devise. §§ There appears to be some inaccuracy in naming the daughter, who is called *Elizabeth* in the first part, and *Mary* in the subsequent clause. The testator gave an estate to *Elizabeth*, and *Mary* was the same person. But 346

if she had no previous estate, it would not affect the remainder over.

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Riggs, in reply. If we look at all the different devises contained in this will, some of which are for life, to pay debts, &c., it is impossible to believe that the testator intended to create an *estate-tail*. The words in the clause which has given rise to the present question, do not *expressly* create such an estate. If such an estate can be made out, it must be by implication. Hence it has become necessary to examine the numerous authorities on the subject. The *English* courts have favored *estates-tail*, where the words *issue*, or *heirs* of the body, have been used, because it was beneficial to the devisees. That reason can have no influence in this case, for the devisees are not benefited by such a construction. The clause must create an *estate-tail* in all the persons named, or none at all; in the daughter *Mary* as well as in the sons: for we cannot intend that *Mary* and *Elizabeth* are the same person. In the other part of the will, the testator gave an estate in fee to *Elizabeth*, and devised one hundred pounds, and half the movables, to *Mary*. Now, no case can be found where an *estate-tail* descendible can pass, where one of the devisees has no estate of *freehold* on which it can be engrafted. Where a limitation is to the heirs of the body of the husband and wife, and there is no estate limited to the husband, the words do not give an *estate-tail* to the wife, to whom an estate is limited, but are considered as words of *purchase*. An estate cannot be made to descend to the heirs of the body of a person who takes nothing.† In case of the death of the four brothers, *Mary* would not have taken the estate; there was another sister who would have been a coheiress, and another brother. Courts are *disposed, in their construction of wills, to favor those who, in case of survivorship, would be heirs at law. Again, after the clause in question, there are certain easements made, and encumbrances created; *John* and *Jacob* might build, &c., and have two acres each at their election, absolutely. This is inconsistent with the idea of an *estate-tail*. Are there, then, any words so *express* and *technical* that they will admit of no other construction than the one contended for on the part of the defendant? The word *heir* is construed variously, so as best to carry into effect the intention of the testator. As to the application of the rule that the court are to construe the words so as to create a remainder over, if possible, instead of an executory devise, it may be said, that as *Mary* could take no estate in remainder, there could be no remainder over. Are there any legal objections to considering it as an executory devise? As to time; the estate was to vest in the life or lives of persons in being. Suppose it to be an estate for life over, after failure of male issue; and one dies without leaving such issue, and then another dies leaving male issue, the estate

† *Dyer*, 64. 99.
Lane v. Pannell. 1 *Roll Rep.* 238. 317.
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438. *Goffage v. Taylor*. *Opinions of Ch. J. Wilmot*, 362.
Froggert v. Whartry.

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12 *earne*, p. 203.
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† 3 *Term Rep*
143. *Porter v*
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would go to the survivors; and by the words, "equally to be divided between them," they would take in fee. It is, therefore, a good executory devise over to such as should survive those who died, without male issue of their bodies. It is not denied, that dying without issue imports an indefinite failure of issue; but here the estate is to go to the survivors on failure of male heirs of the body. But the cases which have been cited show that the words *dying without issue*, &c. have been construed to be an *executory devise*. As to the case, so much relied on, from *Earne*,† it is to be observed, that there was a devise over to the daughter, who, on the death of all the sons, would have been heir; and, on the same principle that governed in the case in *Wilmot*, the construction as to an *estate-tail* was adopted for the benefit of the devisees. It is the same as giving an estate to a man and his heirs. This is the true meaning and only sound sense of that case. In any other sense, it is not law. As to the remark in the opinion of Lord *Kenyon*,‡ it is to be remembered, that his lordship was searching for the intent of the testator, not the technical meaning of the words; and, in that view, his observation, that there could be no difference between real and personal estate, was just; for it could not be supposed that an unlettered testator would have in his mind the legal distinction, or intend to distinguish between them. There has been too much refinement by *Fearne*, *Powell*, and other *English* lawyers, about remainders, and executory devises. These subtle distinctions have been carried beyond the bounds of reason and common sense. It would be useless to comment on all the numerous decisions and criticisms of elementary writers. In this country, *estates-tail* are not to be favored. The legislature, by abolishing them, has expressed its decided aversion to that mode of transmitting property. Will the court, by a forced construction, or an adherence to technical nicety, consider this an *estate-tail* down to a certain period, when it was turned into a *fee simple* by the operation of the act of the legislature, and thus permit a quiet possession under an ancient title to be disturbed?

THOMPSON, J., delivered the opinion of the court. The determination of this question will depend on the interpretation to be given to the devise over to the surviving devisees: if this were to take effect only on an *indefinite failure of male issue*, *William* took only an *estate-tail*. But if, from the context, or the whole will taken together, it may be construed to take effect on the failure of male issue, *during the life of the first taker*, or, as applied to the present case, during the life of *William*, the devise over is good as an *executory devise*, and will not in any way affect or qualify the prior clause in the will, wherein a *fee simple* is devised to *William*. This is a question of construction, depending on the intention of the testator; and from the whole will taken together, I cannot

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entertain a doubt that he meant to provide, that in case *any of the devisees named in this clause should die without leaving male issue at the time of his death, his portion should be divided among the survivors. Neither do I think that there is any stubborn or rigid rule of law that will militate against this construction. The cases in the books on this question furnish us with many nice distinctions, all, however, made for the purpose of giving effect to the intention of the testator, which is considered a cardinal rule in the construction of wills. Lord Chief Justice *Wilmut* said, that he would lay hold of the most trifling circumstance to give effect to the apparent intention of the testator. (*Keily v. Fowler*, *Fearne's Ex. Dev.* 236. 245.) In the case of *Pell v. Brown*, (*Cro. Jac.* 590.) which Lord *Kenyon*, in the case of *Porter v. Bradley*, (3 *Term Rep.* 146.) terms the foundation, and, as it were, the *magna charta* of this branch of the law, the devise was to *Thomas* and his heirs for ever, and if *Thomas* died without issue *living William*, then the devise was over to *William*. This was considered a devise in fee to *Thomas*, and not an *estate-tail*; the words *living William* were thought sufficient to make the devise over to *William* an executory devise. In the case of *Hughes v. Sayer*, (1 *P. Wms.* 534.) the testator had devised his personal estate to *A.* and *B.*, and upon either of them dying without children, then to the *survivor*. This was held a good devise over, for the words dying without children, must be taken to be children living at the death of the party, and could not mean an indefinite failure of issue; and the reason assigned was, that the immediate limitation over was to the *surviving devisee*: and it was not probable, that if either of the devisees should die leaving issue, the survivor would live so long as to see a failure of issue, which, in notion of law, was such a limitation as might endure for ever.

If the reason assigned for the decision in this case be solid, it applies with full force to the one before the court; for here the limitation over is to the *surviving devisees*. The only difference between the two cases is, that the one *relates to *personal*, and the other to *real* estate, which, it is contended, requires a different rule of construction, according to the adjudged cases. I find no distinction, however, with respect to the effect which the words *surviving devisees*, or any other words, or parts of the will, are to have in ascertaining the intention of the testator. It is true, that in the case of *Forth v. Chapman*, (1 *P. Wms.* 667.) the lord chancellor thought the words, *leaving no issue*, ought to receive a different construction when applied to real, than when to personal estate; that, as to the former, the words, *ex vi termini*, ought to be considered to mean an *indefinite failure of issue*, and, as to the latter, a *failure of issue living at the death of the first taker*. (a) The sound-

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(a) In *Doe v. Perryn*, (3 *Term Rep.* 494.) *Buller, J.*, says the reason why it has not been decided in limitations of freehold estates, that the words "*dying without issue*" does

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ness of this distinction has been much questioned. In the case of *Porter v. Bradley*, (3 Term Rep. 145.) Lord *Kenyon* rejected it, and said, that it would be very strange if these words had a different meaning when applied to real and personal property. If such a distinction existed in the law, it would not agree with the rule, *lex plus laudatur quando ratione probatur*; but it was not founded in law. In that case the court decided, that if lands be devised to *A.*, his heirs and assigns for ever, and if he die *leaving no issue behind him*, then over, the limitation over is good by way of executory devise. In the case of *Roe v. Jeffery*, (7 Term Rep. 589.) the devise was very analogous to the present; it was to *T. F.* and his heirs for ever; but in case he should depart this life and leave no issue, then to return unto *E. M.* and *S.*, or *the survivor or survivors* of them, to be equally divided betwixt them, share and share alike. This was held a good executory devise, for the testator must have meant the devise over, *on failure of issue living at the death of the first taker*. The principal reason assigned for this conclusion was, that the devise over was to persons then in existence; and Lord *Kenyon* here again takes an opportunity of observing, that he was not prepared to unsay what he had said in *Porter v. Bradley*, respecting the distinction taken in *Forth v. *Chapman*. Without, however, expressing any decided opinion relative to the correctness of this distinction, I think it is fairly to be collected from the provisions in the whole will, that the testator, in the case now before the court, intended that the devise over should take effect in case the first taker should die without a son living at the time of his death, and that it was not to depend on an indefinite failure of male issue. The former part of the will, in which the premises in question are devised in fee simple to *William*, is totally distinct and independent of the clause in question; and though this devise may, by subsequent provisions, be confined and restricted, so as to carry only an *estate-tail*; yet, in order to give it that effect, it ought to appear clearly that such was the intention of the testator. But there is nothing in the whole will, except the particular clause in question, that tends in the least to show that the testator meant to give to his son *William* an *estate-tail*. He had parcelled out his estate among his children as he thought just and right, giving them, in the first instance, a fee simple interest, which shows pretty clearly what his intention was with respect to the estate he meant to devise. It is most probable, if he had intended to devise an *estate-tail*, that he would have done it in the first instance, and not have left it to be raised by implication. The devise over, also, being to the surviving devisees, among whom was his daughter *Mary*, to whom he had not in any other way devised any real estate, is another

not mean "without issue at the time of the death of the party," is, that the courts of law always lean in favor of the vesting of estates, and, therefore, the estate shall vest on the birth of the child, without waiting for the death of the parents.

strong circumstance, according to the authorities cited, to show that the clause in question was only intended to provide for the contingency of any of the devisees dying without leaving heirs male living at the time of their death. The opinion of the court, therefore, is, that the plaintiffs are entitled to judgment.

Judgment for the plaintiffs.

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THIS was an action on the case, in the nature of a writ of *deceit*, and was tried at the *New-York Sittings*, on the 31st December, 1805, before Mr. Justice *Livingston*, when a verdict was found for the plaintiff. At the last term, a motion in arrest of judgment was argued, and also a motion for a new trial or nonsuit.† As the court decided that the judgment must be arrested, it is unnecessary to take notice of the facts in the case, or the arguments of the counsel on the second motion. The declaration contained three counts. The first was as follows:—"Whereas, the said *R. M.* and *S. B. M.*, on the 13th February, 1802, at, &c., did make a certain assignment in writing, concerning three fourth parts of a certain newspaper, purporting, among other things, that the said *R. M.* and *S. B. M.*, proprietors and publishers of a certain undivided three fourth parts of a certain newspaper called the *Daily Advertiser*, published in the city of *New-York*, in consideration of 11,205 dollars, &c., bargained, sold, &c. to the plaintiff, all their right, &c. in and to the said newspaper, &c., together with the printing presses, &c. And whereas, also, before the making the said assignment, to wit, on the, &c., at, &c., a conversation was held between the said *S. Bayard*, and the said *R. M.* and *S. B. M.*, touching the purchase and sale of the said three fourth parts of, &c., and the price to be paid therefor, and touching the number of the subscribers for the said newspaper, &c., and who were severally to pay for the same at the rate of eight dollars per annum, &c., and touching the amount of moneys received yearly from persons to whom the said newspapers were delivered, and for having advertisements printed or published in the said newspaper, and touching the expenses yearly in and about printing, &c., and touching the profits accruing yearly to the proprietors or publishers of the said *newspaper, &c., and touching an assignment to the purport, &c., to be made by the said *R. M.* and *S. B. M.* to the said *S. Bayard*, if he and they should finally agree, &c. And the said *R. M.* and *S. B. M.* did, then and there, thereupon affirm to the said *S. Bayard*, that the number of subscribers to

In an action for a *deceit* in the sale of a newspaper establishment, it was held, that the declaration must expressly allege that the defendant made the affirmation *falsely, fraudulently, or knowingly*, or it will be bad, and the defect of these words will not be supplied by the concluding part of the count, and so, by reason of the said affirmation, the plaintiff was *falsely and fraudulently deceived*, &c. The want of such allegation of *fraud* or a *scienter* is not helped by a verdict.

† *Ante*, p. 310.

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the said newspaper did then exceed 900, and that such profits did then exceed the rate of 3,000 dollars by the year, and the said *S. Bayard*, giving faith to such affirmation, it was finally agreed by and between them, &c. (stating the purchase by the plaintiff, and price as expressed in the written assignment, and that the consideration-money was paid, &c.) *Whereas* the number of subscribers, &c., at the time of the said affirmation, &c., was less than 900: that is to say, they did not exceed 600: and there were not then any profits accruing to the said proprietors of the said newspaper, &c. And so the said *S. Bayard* says, that he, by reason of the said affirmation of the said, &c., *was falsely and fraudulently deceived,*" &c. The second count was the same as the first, except stating the affirmation, &c. to be made by *S. B. Malcolm* alone. The third count stated the written assignment and previous conversation, and that "the said *R. M.* and *S. B. M.* did, then and there, thereupon affirm to the said *S. Bayard*, that they did not know the number of subscribers, &c., nor the amount of the money received yearly, &c., nor the yearly expenses, &c., but that a certain *C. Snowden* and a certain *W. P. Miller*, then and there servants and agents of the said *R. M.* and *S. B. M.*, employed by them in and about the printing, publishing and vending the said newspaper, &c., well knew the number of subscribers and money received, &c., profits, &c., and the said *S. B. M.* did then and there refer the said *S. Bayard* to the said *Snowden* and *Miller* touching the number of subscribers, &c. That afterwards, and before finally agreeing to the said purchase &c., a conversation was had between the said *S. Bayard*, and the said *Snowden* and *Miller*, severally, touching, &c., *and that, on such conversation and inquiry, the said *Snowden* and *Miller* did respectively affirm to the said *S. Bayard*, that the number of subscribers, &c. did exceed 900, and that the profits did exceed 3,000 dollars, &c. And the said *S. Bayard*, giving full faith and credit to the said affirmations and representations, did make the purchase, &c. *Whereas* the number of subscribers, then, were less, &c., nor were there any profits, &c. And so the said *S. Bayard*, by reason, &c., *was falsely and fraudulently deceived,* &c. *Wherefore* he is made worse, and hath damage to 20,000 dollars," &c. The defendants pleaded *not guilty*.

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The reasons assigned in arrest of judgment were, 1. That though the plaintiff in his declaration averred that the affirmations stated were false, he nowhere says that the defendants made such affirmations fraudulently; 2. That the plaintiff neither says that the affirmations were fraudulently made, nor that the party or parties making the affirmations *knew* at the time that they were false; 3. That in the first count the affirmations are stated to be made by both of the defendants, and in the second, by one of them only, without averring that he acted with

the authority or privity of the other; and the jury have found an entire verdict on all the counts.

Hoffman, for the defendants. The declaration must be either on a *warranty*, or *fraud* in the sale. That it is not on a *warranty* is evident from the declaration itself, and from the precedents and authorities on this subject.† If the declaration be in *assumpsit*, you may use words equivalent to a *warranty*, but if it be on the *warranty*, then the words *warrantizando vendidit*, must be used. In *Seixas v. Wood*,‡ though the affirmation was in writing, it was held to be no *warranty*. Again, the contract is alleged to have been sealed and delivered; but the bill of sale contains no *warranty*. If the plaintiff intend to recover on the ground of *fraud*, he may proceed on matters *dehors* the instrument; but if he mean to rely on the *warranty*, he must confine himself to the written contract.§ It will be *found, that in all the cases where an affirmation has been held to amount to a *warranty*, it has been as to the *title* of the vendor only, and not as to the *quality*, &c. of the thing sold.|| Again, there is no *sciēter* averred. It is essential to this action, that either the *sciēter* of the party should be alleged, or that he *fraudulently affirmed*.¶ Any legal conclusion or inference does not help the want of a substantial averment of a matter of fact.†† The defect in this declaration is not cured by the verdict. Wherever the party states a defective title, or omits to state any title, or cause of action, a verdict will not cure the defect, either by common law, or the statute of *jeofails*.‡‡ *Buller, J.*, in the case of *Bishop v. Hayward*,§§ says, if the title be defective on the face of it, the judgment cannot be sustained; and by way of illustration, as to what defects are cured by verdict, he puts the case of a feoffment pleaded without livery, where the livery is implied as making part of the feoffment. And again in *Spiers v. Parker*,||| he says, nothing is to be presumed after verdict, but what is expressly stated in the declaration, or is necessarily implied from the facts which are stated; and he adds that he does not know of a decision against this rule, except a *dictum* of Lord *Hardwicke*. A verdict may cure ambiguity; but it will not supply or cure the want of matter which is the *gist* of the action.¶¶ Further, the second count is on the affirmation of one of the defendants alone; and the verdict is general. Fraud is not to be presumed, and one joint owner or partner is not answerable for the fraud of the other.

Benson and T. A. Emmett, for the plaintiff. This is, in truth, an action for a *deceit*, and all the cases cited about *warranty* are inapplicable. Though it be necessary to allege fraud and falsehood in the defendants, yet it is sufficient if that be done substantially, and by words tantamount. The words, "That by reason of the said *affirmation*, he was falsely and fraudulently deceived," amount to the same, as saying he

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† 2 Ld. Raym.
1118. *Lysney v.*
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‡ 2 *Caines*, 48

§ See *ante*, p.
414. *Mumford*
v. M'Pherson.

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¶ 1 Ld. Raym.
593. *Medina*
v. Stoughton.
Ante, p. 274.
Deffreere v.
Trumper.

† 2 *Saund.* 180,
181.

‡‡ See 2 *Caines*,
53. *Douglas*,
20. *Buller's N*
P. 30.

‡‡ See 1 *Saum-*
ders, 228. c.
note, and the au-
thorities there
cited.

§§ 4 *Term Rep.*
472.

||| 1 *Term Rep*
145.

¶¶ *Cowper*, 82C
Avery v. Hoole,
1 *Term Rep.*
141.

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† *Michael v.*
Alestreet, 2 Le-
vins, 172.

† *Stiles, 300. 1*
Kemble, 610. 1
Siderfin, 146.
2 *Lord Raym.*
1118. 3 *Term*
Rep. 15. 1 Lord
Raym. 593. Yel-
verton, 20. Rob-
inson's Entries,
53. *Hearne's*
Pleader, 102.

§ 1 *Saunders,*
228. (a).

|| 2 *Shower, 234.*
245. 5 *Co-*
mun's Dig. tit.
Pleader, C. 87.
Cro. Car. 497.

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¶ 3 *Salk. 12.*

falsely and fraudulently affirmed. In an action for driving an unruly horse, there was no *scienter*, nor any *negligence* alleged, but only that the defendant imprudently *and incautiously, and without due regard to its being an improper place, drove the horses there; yet the plaintiff had judgment.† In this view, the declaration would be good on a general demurrer. It is true, that where the breach assigned is a *general conclusion* from all the preceding matter, it cannot be applied to help the defects of the antecedent part: as where it is said, *by reason of the premises, &c.* But here the breach is not expressed in this general manner, but so as to have a special application to the very words in the former part, which prevents all ambiguity or uncertainty. It is well settled that an action will lie on a false affirmation. If a vendor will make an affirmation to which the vendee gives credit, and is of such a nature that the vendor must have known whether it was true or false, and there be no *laches* on the part of the vendee, the law will imply the *scienter*.‡ But if this declaration would not have been good on a general demurrer, it is helped by the verdict. The authority of Justice *Buller*, in *Spiers v. Parker*, is deserving of great respect; but the opinion there laid down seems broad enough to support the doctrine contended for by the plaintiff; for the fraud is necessarily implied from the words of the declaration. The more general and correct rule is the one laid down by Serjeant *Williams*, in a note in *Saunders*:§ “Where there is any defect, imperfection or omission in any pleading, whether in substance or form, which would have been a fatal objection upon demurrer, yet if the issue joined be such as necessarily required on the trial, proof of the facts so defectively or imperfectly stated or omitted, and without which it is not to be presumed that either the judge would direct the jury to give, or the jury would have given the verdict; such defect, imperfection or omission is cured by the verdict, by the common law.” In *Hitchen v. Stevens*,|| the rule was laid down by all the court, that where any thing is omitted in a declaration, though it be matter of *substance*, if it be such as, without proving it at the trial the plaintiff could not have had a verdict, such omission shall not arrest the judgment. *Buller* observes, that there is no decision *against the rule he laid down, but a *dictum* of Lord *Hardwicke*; yet, if the report of that case is read, it will be found to be the opinion of the whole court, and not a mere *dictum*. The only case that militates against the rule laid down in *Shower* and *Comyn*, is that of *Buxentine v. Sharp*.¶ If the rule given by *Buller* be the true one, nothing can be presumed after verdict. The most that can be said is, that if there be no facts, or combination of facts, in the declaration, to support a fact not averred, then the fact cannot be presumed; but if there be such a combination of facts, from which such fact not averred can be presumed, it shall be presumed. The words used in the declaration are such as to

afford a necessary inference of fraud, and therefore the want of a direct averment is cured after verdict. The case of *Cross v. Garnet*[†] is an authority to this point. There, on a declaration for *deceit* in the sale of oxen, after verdict for the plaintiff, there was a motion in arrest of judgment, because there was no *scienter* nor *warranty* alleged, nor that the defendant sold them *fraudulently and deceitfully*; yet the court held, that though these exceptions would have been good on *demurrer*, yet after verdict it was well enough, and the plaintiff had judgment.

As to the objection that there is no averment that *R. M.* authorized *S. B. M.* to make the declaration, it may be said that the defendants were not joint owners of a chattel; for the right of printing and publishing a gazette is not a chattel. They were mere partners in that undertaking. The declaration contains facts which afford the necessary inference that they were partners, and, after verdict, it will be intended that evidence was given to the jury of such authority from *R. M.*[†] Indeed, the one is to be considered as the agent or servant of the other in this transaction, and by executing the bill of sale, and receiving his share of the purchase-money, a strong presumption is afforded, that *R. M.* knew and approved of the representations of *S. B. M.*

Harison, in reply. It is true, as has been observed by Lord *Mansfield*, that pleadings are to be tried according to the rules of sound logic: and it is not difficult to prove that *this declaration is deficient in that logical precision and certainty required in good pleading. The true distinction between actions on a warranty, and those for a fraud or deceit, is well laid down in *Williamson v. Allison*, and *Springwell v. Allen*.[§] If the party proceed on the warranty, fraud or deceit need not be alleged; and that the latter are to be found in some old precedents, in actions on warranty, is to be imputed to the extreme caution of the pleaders, which has thus given rise to all the apparent confusion on the subject, in relation to tort and contract. But the addition of *fraudulently and deceitfully*, &c., in those cases, was unnecessary, and is to be rejected as surplusage. Those words are used in the general conclusion of all declarations on contract or *assumpsit*, but are not meant as an allegation of fraud, nor do they make it an action for fraud. The present action is not on the contract of warranty, but is truly and substantially an action for fraud, *quasi ex delicto*. The opinion delivered by Mr. Justice *Buller*, in *Paisley v. Freeman*,^{||} if attentively examined, will be sufficient to do away the distinction attempted to be set up, about the party's being in possession or not.

If it be intended to rely on an affirmation as a warranty, it must be either stated, as a warranty, *warrantizando vendidit*, or by way of *assumpsit*, which is the modern way of laying the

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† 3 *Modern*,
261. *S. P.* 1 *Vi-*
ner, 562. pl. 18.
Warner v. Tul-
lard. Roll. Abr.
91. *Th. Raym.*
487. *Ld. Raym.*
392. 1 *Bos. &*
Pull. 329. *Cow-*
per, 826. 1
Salk. 211.

† *Y. B. Hen. VI*
9. 53. *Roll. Abr*
91. *Book of As-*
size, 42. pl. 8
Cro. Jac. 196

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§ 2 *East*, 448

|| 3 *Term Rep*
56.

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† *Springwell v. Allen, Alley*, 91, more fully in a note, 2 *East*, 448.

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† 2 *East*, 446.

§ 2 *I.d. Rayn.* 1118.

|| 3 *Term Rep.* 36. See also *Bull. N. P.* 30. 3 *Mod.* 261. *Carthew*, 90. 1 *Show*, 68.

¶ 1 *Saund.* 228. note.

†† *Douglas*, 680.

warranty. But it would be too lax in practice to permit declarations to be so framed, that they might assume the shape of an action on the *contract*, or for a *tort*, as best suited the views of the plaintiff. In the case cited from *Robinson's Entries*, the declaration is laid in *assumpsit* to try the question of warranty. That the present could not have been intended as an action for a warranty, is evident from there having been a written contract, sealed and delivered, in which all previous warranties are to be considered as merged. It is, in truth, as one of the counsel for the plaintiff has said, an action for a *deceit*. *Fraud*, or a *scienter*, is the *gist* of such actions.† Now the *gist* of every action must be laid with clearness and *certainly* in the declaration. It is an established maxim in pleading, that the basis of the action must be presented precisely and clearly to the court by pleading, *and to the jury by evidence. Though the plaintiff is not obliged to use the word *scienter*, or knowingly, yet he must state what is clearly equivalent. Thus much, at least, is required by every authority that can be found deserving of any consideration. The essential allegation, or *gist* of the action, should be stated in the first part or body of the declaration, and cannot be made out by inference, or by the application of the general conclusion. A *scienter*, or *maliciously* or *fraudulently* affirming, is sufficient to express the *gist* of the action. Here a simple affirmation is first stated, and afterwards a conclusion that the plaintiff was thereby *fraudulently deceived*. A false affirmation may be made, without any *scienter* or *fraud*, and so afford no ground of action. As the plaintiff does not aver that the affirmation was made *falsè et deceptivè*, falsehood or deception cannot be inferred so as to support the action.‡ It is agreed on the other side, that this cannot be helped by a general conclusion going to the whole premises; and an attempt has been made to discriminate the concluding words of the count, from the general conclusion. A conclusion to a part has the same effect as a conclusion to the whole. In the case from *Saunders*, the conclusion was like the present, *and so, &c.*, which was held to be a nullity, if the premises did not warrant the conclusion. In *Lysney v. Selby*,§ and in *Paisley v. Freeman*,|| and other cases, the allegation was, that the defendant *falsely* and *fraudulently* affirmed, &c. The plaintiff is bound to prove only the premises, and not the conclusion of his declaration. Then, as to the other point, where the *defect* in the declaration goes to the *gist* of the action, it is not cured by the verdict.¶ On the broad principles contended for on the part of the plaintiff, there is no defect in a declaration which cannot be cured by a verdict. In the case of *Rushton v. Aspinall*,†† the same argument was urged as in the present case, but it was overruled by the court. It is very probable that if all the decisions are searched, as far back as the *Year Books*, some may be found that may be in favor of the plaintiff; but it is the busi-

ness of the court to apply the touchstone of legal discrimination *to these cases, otherwise the law will be only a rude chaos of discordant opinions. If the principles of sound logic be the basis of the science of pleading; if the apparent discrepancy of opinion among various judges, is to be tried by legal discrimination, it will be found, 1. That this declaration, if intended to be on a warranty, is bad, as there was a writing sealed and delivered between the parties. 2. If it be an action for a *deceit*, then *fraud*, or a *scienter*, should have been directly and clearly alleged. 3. A general conclusion will not help the want of averment in the body of the declaration. 4. That it would have been bad on a general demurrer, and the defect being *essential*, and of substance, cannot be cured by a verdict:

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THOMPSON, J. The question presented to the court is touching the sufficiency of this declaration after verdict. It must be considered as a declaration founded upon a warranty, or upon a fraud or deceit in the sale of the establishment, in neither of which points of view can it, I think, be supported. Without entering into an inquiry, whether a mere affirmation is to be considered as a warranty, there is a fatal objection to the declaration, if considered as one founded on the contract. It states the sale and transfer to have been made in writing, under the hands and seals of the defendants. All previous representations must be considered as conversations leading to a contract, to be consummated by the bill of sale, and as coming within the rule adopted by the court in the case of *Vandervoort v. Col. Ins. Company*, (2 *Caines*, 161.) and in the case of *Mumford v. MPherson*, decided in this term, *That when an agreement is reduced to writing, all previous treaties are resolved into that*. Whatever remedy, therefore, the defendants may have on the contract, must be on the bill of sale. If this declaration is to be supported at all, it must be as one founded on a fraud in the sale of the establishment. Here, also, are insuperable objections. The sale is not alleged to have been made fraudulently, nor that the defendants knew their affirmations were false. The declaration, regularly, ought to proceed to charge, that *the defendants knew of the matter by which they deceived, and that they did it falsely and fraudulently. An allegation of a *scienter* might, after verdict, supply the omission of falsely and fraudulently, or falsely and fraudulently import that they knew it; (3 *Mod.* 261. *note*;) but one or the other is indispensable. Where there is no warranty, the *scienter* or fraud is the *gist* of the action. This principle has been frequently decided by the courts in *England*, and recognized by this court. (1 *Ld. Raym.* 595. 2 *Ld. Raym.* 1118. *Doug.* 20. 3 *Term Rep.* 56. 62. 2 *East*, 322. 448. 2 *Caines*, 48.) The conclusion of each count, that by reason of the said affirmations, the plaintiff was falsely and fraudulently deceived, is not sufficient. It is no more than the common conclusion of

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a declaration. The fraud is a substantive allegation, and must be laid in that part of the declaration which sets out the plaintiff's cause of action, otherwise he is not bound to prove it upon the trial. Where the action is founded on the contract of sale, the declaration usually concludes, that the defendant falsely and fraudulently deceived the plaintiff, &c.; yet this is not necessary to be proved, not being of the essence of the declaration. (2 *East*, 448.)

The only remaining question is, whether the defects or omissions are cured by the verdict. I think they are not. A verdict will not amend the matter, when the *gist* of the action is not laid in the declaration. (*Coup*. 826.) Lord Mansfield says, the rule is, that where the plaintiff has stated his title, or ground of action, defectively or inaccurately, a verdict will cure it, because to entitle him to recover, all *circumstances* necessary in form or substance to complete the title so imperfectly stated, must be proved at the trial, and it is fair to presume, after verdict, that they were proved. But where the plaintiff totally omits to state his title or cause of action, it need not be proved at the trial, and therefore there is no room for such presumption. (*Doug*. 683.) To apply this rule to the present case; what is the cause of action here? It is a *fraudulent* sale of the *newspaper establishment; but no such fraud is alleged in the declaration; it cannot, therefore, be presumed to have been proved. Under this declaration, all that the plaintiff would be required to prove would be, that the defendant affirms that the number of the subscribers to the paper exceeded nine hundred, and that the annual profits of the establishment exceeded 3,000 dollars, and that these affirmations were untrue. But these facts would not have created a good cause of action, according to the decisions of the cases already cited, unless these affirmations were made fraudulently, or known by the defendants to be false. Thus, in the case of *Burentine v. Sharp*, (3 *Salk*. 12.) the declaration against the defendant was for keeping a vicious bull, but it stated no *scienter*. This was held bad after verdict, for the action lies not, unless the owner knows of this quality, and it could not be intended that it was proved at the trial, for the plaintiff need not prove more than is laid in his declaration. (1 *Term Rep*. 145. 3 *Mod*. 261. *note*.) The result of my opinion, therefore, is, that the defects in the declaration are not cured by the verdict, and that the judgment must be arrested.

SPENCER, J., and TOMPKINS, J., concurred.

LIVINGSTON, J. I cannot concur in this opinion. The objection to the first count, which applies also to the other two, is the want of an averment, that the affirmations, which induced the purchase, were *fraudulent*. The plaintiff insists that each count contains a perfect cause of action, set forth with sufficient certainty, without any defect in form or substance; 358

and that if it be otherwise, yet even an omission in substance is cured by verdict at common law, if the issue necessarily required proof of the matter imperfectly stated, or altogether omitted, and without which a judge could not direct, nor a jury consent to find, for the plaintiff.†

There is some difficulty in accurately defining what faults are cured by a verdict. To this point there is much learning and a great variety of cases, not always intelligible, nor free from contradictions. There is no risk, however, in saying, that where it may with certainty be collected from the *manner in which the action is laid, that the whole merits must have been tried, courts will not readily listen to reasons in arrest of judgment. After a full and fair discussion, it is so hard and unjust to put a party to further litigation for an error in pleading, that every struggle should be made to uphold a declaration, not radically bad, or if, from the whole of it, a good cause can be extracted, though not very formally set forth, nor in the way generally, or most usually, pursued.

Whether this declaration stand in need of the indulgence which these remarks would seem to bespeak, I will not say; but after a very careful inspection, it does not present to me any of those glaring defects which can alone justify the extraordinary interposition that is expected from us. The omission to allege a *scienter* in the defendants and their agents, is the ground of objection we are now examining. Without *fraud* or *deceit*, this action cannot be maintained; and to render a party guilty of either, there must be not only a *false* affirmation, but it must be made with *knowledge* of its being false. Hence it follows, generally at least, that a declaration, to be perfect, must charge a defendant with *knowingly* having recourse to a *falsehood* to promote a bargain. How far this averment can be essential, when, as in the case before us, a misrepresentation is alleged to have proceeded from the vendor himself in relation to the profits of an establishment of which, for aught disclosed by the record, he may have been in possession for many years, is a point well deserving consideration. It is next to impossible for the owner of any such establishment to be ignorant whether it be lucrative, or otherwise; he cannot, therefore, without design, make any considerable mistake about it. But without determining on the fitness of a declaration, in a case like the present, if this averment had been wholly omitted, it is without pretence that its existence is denied here. Each count, after denying the truth of the affirmations, contains this averment:—"And so the plaintiff saith, that he, by reason of the said affirmations, was *falsely and fraudulently* deceived." At the end of the last count follows the common *conclusion, "that the plaintiff is *therefore* made worse, and hath damage," &c.

From this statement, may it not be asked, Where is the omission of which so much complaint is heard? Is not an allega-

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tion of a party's being *falsely and fraudulently* deceived, by the representation of another, essentially the same as saying that he had been thus deceived by the person making the false assertion, or, in other words, that the same was known to him not to be true? This knowledge, then, is as necessarily imputed to the defendants by this kind of averment, as by any other, because, without it, though the plaintiff might be deceived, he could not be so *fraudulently*, which would be true only in case the defendants told a *wilful falsehood*. No other meaning can be affixed to these terms, for such an averment necessarily charges the defendant with *knowledge* of the *falsity* of what he has said, without which there could have been no *fraudulent* deception. This averment, at any rate, necessarily and unavoidably put in issue the *scienter*, and rendered it incumbent on the plaintiff to prove it. If it were material to show that he was *fraudulently* deceived, (and he has rendered it material by his averment,) and that could only be made out by proving that the defendants, or their agents, *knew* they were imposing on him, it follows, reasoning from the record itself, that such proof was not only necessary, but must have been made.

It was said, on the argument, that this averment was only stated as a deduction from premises which, being wholly silent as to the fraud, did not justify the inference, and which, notwithstanding the situation of the parties, might be erroneous. If this were so, it belongs to the jury, and not to us, to pronounce on its correctness. To me, however, this conclusion if it be regarded only in that light, is not only natural, but such as must, almost universally, follow from the same premises. It is immaterial, however, whether what was disclosed in the preceding part of the declaration warranted the averment. The plaintiff had a right to make it, and whether the basis on which it was placed would *support it, was a matter to be settled by a jury. He might have made it on mere suspicion, without assigning any reason; but when he gives one, which we are now to presume a jury have thought sufficient, we ought to be satisfied. If this declaration be not in strict conformity with precedents, yet, if every material allegation may be collected from the whole of it taken together, more, after verdict, should not be required.

By some of the counsel, this averment was considered as only the common conclusion of every declaration of this kind, and, therefore, as not forming a substantial or component part of it. This is not the case, though, even then, it would be sufficient, if it put the *scienter* in issue. It is a distinct allegation, separate from, and unconnected with, the general conclusion, which is found only at the termination of the last count. Its introduction by the monosyllable *so*, which was much insisted on as evidence of its being the result of the plaintiff's own reasoning on the matters before alleged, can do no harm, pro-

ended it be sufficiently explicit and intelligible to bring into discussion the fraud or deceit, which is the *gist* of the action. The rules of pleading have not appropriated any particular part of a declaration for the insertion of this averment. So that, if it be found somewhere, it is enough.

Upon the whole, every count is so framed as necessarily to put in issue the *scienter* of the defendants or their agents; and that by averments, too apt and significant to be misunderstood. This case, then, does not merely fall within that class of cases, in which a court will presume that certain facts not only imperfectly stated, but altogether omitted, yet necessary to be proved, have actually been made out at the trial, which would be conclusive here; but presents the much stronger case of an issue on the *very fact* which it is pretended has been overlooked by counsel, and on the supposed omission of which the whole argument has turned.

Another reason assigned for arresting judgment is, that in one count the affirmation is stated as proceeding from one of the defendants *solely*, without alleging any authority, for that purpose, from the other.

*That the joint owners of any property, who are equally interested in and benefited by its sale, should answer civilly for each other's misrepresentations, and refund what has been thus acquired, is too reasonable to require that we should take up any time in examining this objection to the declaration.

There is also a motion for a nonsuit, or new trial. On this case, it is unnecessary to decide on the points ruled at the trial of the cause; because, if the judge were wrong in refusing a nonsuit, yet as the plaintiff, if he thought his testimony defective, might, and actually did examine other witnesses, notwithstanding the opinion in his favor, it is impossible, without a knowledge of this evidence, which it has been thought proper to keep back, to say, that a nonsuit, if we have power to grant it without an agreement of parties, or another trial, would be proper. This further testimony might support the verdict, though a nonsuit, in the first instance, might have been right. If the defendants have made a case so imperfectly, that we cannot give judgment in their favor upon it, the other party was not bound to amend it, nor is it for us to say that the testimony which is withheld was immaterial. The plaintiff, in my opinion, must have judgment on the *postea*.

KENT, Ch. J. I concur in the opinion that the judgment must be arrested. The action is not founded upon a warranty or breach of contract. There is no warranty alleged in the declaration, either in the ancient form of *warrantizando vendidit*, or in the other manner of declaring in *assumpsit*, (2 Cro. 630. Doug. 20. 2 East, 451, 452. 2 Ld. Raym. 1120.) Nor could any *parol* warranty have been shown, if the suit had been brought upon one; for the contract, being reduced to writing,

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5 Viner, 517.
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excluded all anterior verbal negotiations and promises, as being resolved into the writing, which is the consummation and only evidence of the agreement of the parties.†

We must, therefore, consider the declaration as grounded entirely upon deceit or fraud in the sale, and it must be tested by the rules which apply to, and govern that species of action. As fraud is the *gist* of the action, it must be *a substantive allegation. The declaration must state that the defendants, deceitfully or fraudulently, or knowingly, made the false affirmation. The averment merely of an affirmation which was not true, is not sufficient. The defendants must be charged expressly with the fraud, because it is the fraud only which makes them responsible. The case of *Harvey v. Young* (Yelr. 21.) is very analogous to the one before us. The defendant was charged with having affirmed, in a discourse with the plaintiff, that a certain term for years was worth 150*l.*; upon which the plaintiff purchased it for that sum, and it turned out not to be worth 100*l.*, upon which the plaintiff sued the vendor, in an action on the case, for the deceit, and alleged that he gave faith to the assertion, and made the purchase, and that the bargain turned out in *fraud and deceit of him*. After verdict, the defendant moved in arrest of judgment, because the matter precedent did not prove any fraud, for it was but the defendant's bare assertion. The event of the motion is not stated in *Yelverton*, but from the notice taken of the case in 1 *Lev.* 102. 1 *Sid.* 146. and in 1 *Viner*, 563. pl. 19. *note*, it is evident that the motion is considered as having been granted. The case of *Chandelor v. Lopus* (*Cro. Jac.* 4.) is also to this effect. There is some little variation in the books in respect to this case, but they all seem to concur in considering it as having established this position, that in an action for selling a precious stone as a bezoar stone, when it was not such a stone, the declaration must state either that the defendant warranted it to be a bezoar stone, or that he knew it was not, and that stating simply that the defendant affirmed it to be a bezoar stone is not sufficient. (*Cro. Jac.* 469. *The marginal note to Dyer*, 75. a. 2 *Roll. Rep.* 5.) The case of *Ekins v. Tresham* (1 *Lev.* 102. 1 *Sid.* 146. 1 *Keb.* 510. 518. 522. S. C.) goes in confirmation of the same doctrine. It was an action on the case in the nature of deceit, for that the defendant, in a discourse between him and the plaintiff, falsely and fraudulently affirmed the rent of a house to be worth 42*l.* a *year, and that the plaintiff, giving faith thereto, purchased, while in fact the rent was but 32*l.* a year. After verdict the defendant moved in arrest of judgment, and that motion was denied, on the ground which *Twisden* took, that *fraudulenter* was, at least after verdict, equivalent with *sciens*, and *Jones* said, "The *fraudulenter intendens* to deceive the plaintiff was insignificant, but it was further *fraudulenter asseruit*." It would be easy to multiply authorities to the same point, as the doctrine which

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these cases establish is supported by the whole current of precedents and decisions. (*Cro. Jac.* 196. 3 *Ld. Raym.* 31. *Bulwer's N. P.* 30. *Doug.* 20. 2 *East*, 446. 448. *note*, and 450. *note. Prac. Gen.* 18. *Clift. Ent.* 935, 936, 937, 938. *Brownlow*, 80.) I have not been able to meet with a case or precedent, in an action for deceit, where the affirmation of the defendant is not directly or expressly charged to have been made fraudulently or *scienter*. There are cases, indeed, in which the plaintiff goes upon the implied warranty of ownership upon the sale of a chattel, when the fraud need not be alleged; but all these cases of implied warranty are those in which the title of the vendor proved defective according to the distinction stated in the case of *Defreeze v. Trumper*,† and in these cases the simple affirmation of the defendant is sufficient, as was observed by the court, in *Medina v. Sloughton*,‡ and again in *Crosse v. Gardiner*;§ yet, even in these actions for failure of title, and brought upon the implied warranty, the pleader has sometimes added the allegation of fraud or deceit, as was done in the case last cited, by the words *falso et malitiose affirmabat*; and by thus confounding the action on the implied warranty with the action for the deceit, some confusion has been introduced into the precedents on this subject. (*Styles*, 310. *Book of Assizes*, 42. *plf.* 8. *Clift.* 933.)

I conclude, from this review of the cases, that the rule of pleading is clearly and firmly established, that where the *gravamen* is laid upon the deceit, that deceit must be expressly averred, and there is no such averment in the present case. The declaration states a *colloquium*, and *that the defendants did affirm, and that the plaintiff gave faith to the affirmation, and made the contract; and then follows the averment that the facts were not true, as they had been affirmed, and that the plaintiff, by reason thereof, had been falsely and fraudulently deceived. The fraudulent deception is laid merely as inference from the affirmation. It forms no part of the premises. It was not requisite to have been proved upon the trial, and according to the observation in one of the cases already cited, it was insignificant matter, and cannot, therefore, supply the want of a charge, that the defendant *fraudulenter* or *deceptivè*, or *scienter*, affirmed. The only remaining question, then, as it appears to me, is, whether this defect in the declaration be cured by verdict; and here the general rule is, that a verdict will not cure matter which forms the substance of the action. It will aid a title defectively set out, but not a total defect of title. This is an elementary rule, and acknowledged throughout the books. (2 *Salk.* 662. *Cowp.* 826. *Doug.* 683. 1 *Term Rep.* 145. 4 *Term Rep.* 472.) Serjeant *Williams* (2 *Saund.* 228. *n. c.*) has industriously collected and arranged the cases on this subject, and he draws this general conclusion, that, "if the plaintiff states a defective title, or totally omits to state any title, or cause of action, a verdict will not cure the

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† *Ante*, 274.

‡ 1 *Ld. Raym.*
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§ *Carthew*, 90

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defect ; for the plaintiff need not prove more than what is expressly stated in the declaration, or is necessarily implied from the facts which are stated." In the present case, the fraud was not a necessary inference from the premises. The affirmation may have been untrue, and yet innocently made. The *scienter* was not requisite to have been proved upon the trial, because not charged, and therefore we are not to presume it to have been proved. This presumption is only extended to matter which must, of necessity, have been given in evidence to the jury. (a) (*T. Raym.* 91. 487. 1 Lord *Raym.* 392. *Salk.* 211.) The deceit was the foundation of the action ; it ought to have been averred, and the verdict will not cure the omission of it. This was so ruled in **Buxentine v. Sharp*, (2 *Salk.* 662.) and is agreeable to the opinion of Lord *Mansfield*, in *Rushton v. Aspinall*, (*Doug.* 683.) To dispense with the rule would be a dangerous relaxation, and might lead to the loss of certainty and precision in pleading. General rules will sometimes appear harsh and rigorous, in their application to particular cases ; but I entertain a decided opinion, that the established principles of pleading, which compose what is called its science, are rational, concise, luminous, and admirably adapted to the investigation of truth, and ought, consequently, to be very cautiously touched by the hand of innovation.

Judgment arrested. (b)

(a) See 1 *Day's Cases in Error*, 186. in note.

(b) This judgment was reversed in the Court of Errors. (*Feb.* 1807.) See vol 2 p. 550.

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Some coffee belonging to American citizens had been taken by a French privateer, and carried into *St. Jago de Cuba*, and there sold provisionally, by order of the

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French agency established there, and afterwards condemned by a court of admiralty at *St. Domingo* upon a *procès verbal*, and proceed-

THIS was an action of *trover*, for a quantity of *coffee*. The cause was tried at the *New-York Sitings*, the 18th day of *April*, 1806, before Mr. Justice *Spencer*.

At the trial, the following facts appeared in evidence. The plaintiffs were owners of the schooner *Peggy*, of *Newburyport*, and of a greater part of the cargo, consisting of coffee in hogsheads, barrels and bags, marked *S. P.*, and they and the master were joint owners of another part of the cargo, being five bags of coffee, without marks. The schooner had sold her outward cargo at *St. Mark's*, in the island of *St. Domingo*, in *January*, 1804, and took in her homeward cargo, consisting chiefly of coffee, belonging to the plaintiffs and others. On her voyage homeward to the *United States*, she was captured, the 15th of *February*, 1804, by a French privateer, and carried into *St. Jago de Cuba*, where she arrived the 1st of *March*. The coffee in question was purchased, on account of the defendants.

of a *Spanish* merchant, at *St. Jago de Cuba*, and the ship *Two Brothers*, in which it was brought to *New-York*, went along side of the *Peggy*, and took it out of her. The coffee came into possession of the defendants, with the rest of the cargo of the *Two Brothers*, in *May*, 1804, and a demand thereof was made by the plaintiffs, on the 29th of *May*, which was refused by the defendants. It further appeared, that the coffee in question had been purchased by the plaintiffs at *St. Mark's*, which all the time was in possession of negroes, under the government of *Dessalines*, and in a state of revolt from the *French* government. Great quantities of coffee are sold at *St. Jago de Cuba*, but chiefly prize coffee. The master and crew of the *Two Brothers*, when they took the coffee on board, had no knowledge of the plaintiffs' claim, but believed it to have been the property of the vendor there.

The defendants then offered in evidence certain proceedings of the agency of the *French* government at *St. Jago de Cuba*, and the sentence of condemnation of the *Peggy* and her cargo by a *French* admiralty court at *St. Domingo*. These documents were admitted to be duly authenticated, and contained the whole of the proceedings. The facts which they disclosed were, that after a *procès verbal* and examination of the master and mate, a survey of the *Peggy* was ordered by the *French* agency at *St. Jago de Cuba*, and it being reported that she was leaky, and her cargo in danger of being spoiled, it was ordered to be sold provisionally, and the proceeds to be deposited to abide the final decision; and the whole cargo was sold, under such order, to a *Spanish* merchant there; that, afterwards, on the 16th of *April*, subsequent to the sale of the coffee to the defendants, *a sentence of condemnation was pronounced on the coffee at *St. Domingo*, grounded on a *procès verbal* drawn up at sea, and one at *St. Jago de Cuba*, by the *French* agent there, at the time the *Peggy* arrived as a prize, and on the examination of the master and mate. The cause of condemnation assigned, was a contravention of the *arrêts* of the *French* government, as to the trade and intercourse with those parts of the island of *St. Domingo* that were in possession of the negroes. This evidence was objected to by the plaintiffs, and was overruled by the judge. The defendants then offered to prove, that an agency of the *French* government for such purposes, was established at *St. Jago de Cuba*, by permission of *Spain*, with power to proceed in the manner stated; but the judge overruled the testimony. It appeared in evidence, that, at that time, *Spain* was not at war with any power.

The judge charged the jury, that the property of the coffee remained in the plaintiffs, and had not been changed, either by the purchase made by the defendants, nor by any of the acts and proceedings of the captors, or the *French* tribunals; that, in ascertaining the damages, they ought to take into calculation, not only the coffee, exclusively owned by the plain-

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ings at *St. Jago*, the goods having been purchased, *bona fide*, by *American* citizens, of *Spanish* merchants at *St. Jago*, and brought to *New-York*; in an action of *trover*, brought by the original owner, it was held, that such a sale did not divest him of his property, and that he might recover it of the vendee. The *English* law, in regard to sales in *market-overt*, is not applicable in this state, where no such institution or usage exists. (a) A *bona fide* purchase of goods, without notice, or reference to the title of the

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vendor, does not, of itself, give an indefeasible title to the vendee. Beligereents cannot establish prize courts in a neutral country; nor can they make any sale of their prizes there, unless authorized by treaty. The property in goods captured cannot be transferred so as to divest the right of the original owner, unless by a sentence of condemnation by a court of competent ju-

(a) *Murray v. Walsh*, 8 Conn. Rep. 236.

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jurisdiction. The court of the sovereign of the captor is the only competent tribunal to decide on the validity of captures. Prize courts proceed *in rem*, and cannot adjudicate on a prize lying in a foreign [* 474] port, or out of the jurisdiction of the captor or his ally. (a) Courts of common law, though they cannot inquire into the direct question of prize, may, in a question of property, decide whether the condemnation or sale has been made by a court of competent authority. (b) One joint owner of a chattel may bring trover or trespass for his share or interest, and the defendant cannot take advantage, at the trial, of the other partners or co-tenants not being joined, but must plead it in abatement.

(a) *Paga v. Lennox*, 15 Johns. 173. *Hudson v. Guestier*, 4 Cranch, 293. 6 Cranch, 281.
(b) See *Rose v. Himely*, 4 Cranch, 341

tiffs, but a moiety of that part also owned by them jointly with the master. The jury found a verdict for the plaintiffs accordingly.

The defendants moved for a new trial, on the following grounds. 1. That the property in the coffee became vested in the defendants by the purchase; 2. That prize goods may lawfully be sold by the captors in a neutral country, with the consent of the neutral power; 3. That a neutral power may lawfully permit a belligerent to bring prizes into its ports, and to proceed against them there for offences against the laws of neutrality; 4. That a prize carried into a neutral port, may be condemned while lying there, by the tribunals in the country of the captor; 5. That prizes may be sold previous to a condemnation, and a condemnation after such sale, by a court of competent jurisdiction, will divest the original owner of his property; 6. That the *proceedings and condemnation in the present case ought to have been received in evidence, as they were conclusive, and formed a complete defence in the cause; 7. That the present suit is a question of prize or no prize, and belongs, therefore, exclusively to the prize courts; 8. That the judge misdirected the jury, as to the assessment of damages for the moiety of the coffee, which the plaintiffs owned jointly with the master.

S. Jones and Hoffman, for the defendants. By the purchase of the coffee at *St. Jago de Cuba*, the property was changed, and became vested in the defendants. It was purchased at a full price, of a *Spanish* merchant, in the usual course of trade, and without any knowledge of the rights of the plaintiffs. The doctrine of the *English* law as to sales in *market-overt*, is applicable to a case like the present. Every shop, by the custom of *London*, is considered as a *market-overt*, for such articles as the owner professes to trade in, (c) and sales there divest the rights of the original owner. Though we have not adopted the notion of sales in a *market-overt*, still the principle on which they are founded, the convenience and security of trade, is of equal force here. It seems, too, that in *England*, a sale of goods in a shop, though not in *London*, if without fraud or suspicion, will change the property. (d) By the universal law of nations, prize goods may be sold in a neutral country, with the permission of the neutral power; and such sale will divest the property of the original owner. (e) It may be more prudent, and more consistent with a rigid neutrality, for a neutral nation not to permit such sales by belligerents, within its territory; yet, if there be no existing treaty to the contrary, such a permission, on the general principles of the law of nations, may be lawfully granted.

(c) 2 *Bl. Comm.* 449. 2 *Coke's Institutes*, 219, 220. 5 *Co.* 84.

(d) 2 *Comyn's Digest*, *Biens*, D. 3.

(e) *Bynkershoek: Questiones juris publici*, lib. 1. cap. 15. *Vattel*, liv 3. c. 7. s. 132 *Martens on Captures, Recaptures, &c.* s. 36.

In 1793, a *British* vessel, captured by a *French* frigate, was carried into *Charleston, S. C.*, and sold there by the authority of the *French* consul, as a prize, at public auction.† Whether done by virtue of a treaty or not, makes no difference. The question is, whether it be consistent with the general law of nations, and the neutral government *has consented to the proceeding. It frequently becomes necessary, and admiralty courts do often direct, that the goods taken should be sold prior to any adjudication as to the prize; retaining the proceeds to abide the final decree of the court; and this may be done in the neutral country into which the prize is carried. Here we offer a decree of condemnation to justify the provisional sale. Can it be denied that a *bona fide* purchaser, at such provisional sale of goods, would acquire a valid title to them? The *English* High Court of Admiralty has recognized the legality of the sale, and even of the condemnation of goods, while lying in a neutral port.‡ That court has proceeded to adjudicate on prizes carried into the ports of *Lisbon* and *Leghorn*, and on depositions taken in those places. The same practice has been authorized by *Russia, France, Venice* and *Naples*. It may be said, perhaps, that prize courts proceed *in rem*, and that the thing itself must be within its jurisdiction before a decree of condemnation can be pronounced. This may be a rule of the *English* courts, but it does not appear to be a principle of the universal law of nations. The validity of the proceeding does not depend upon the thing's being within the jurisdiction of the court. Thus in the case of co-belligerents, an admiralty court at *Bordeaux* may decide on a prize lying at *Cadiz*, and so *vice versa*. The question is not whether a belligerent has a right to establish a prize court in a neutral country: it is enough, that a prize court at *St. Domingo* proceeded, with the assent of the *Spanish* government at *St. Jago de Cuba*, to decide on a prize lying at the latter place. As it regards the transfer of property, the adjudication was as legal and valid as if the vessel had been within the jurisdiction of the court. Whether it is a wise policy or not, for a neutral nation to allow any such proceedings within its territory, is a distinct question. If the neutral has the right to consent, and does consent, the proceedings are valid. If it could be legal in any case for a court of a belligerent nation to decide on property lying in a port of another country, it must be in the present case. *Spain* was in amity with the *United States*, and the ally of **France*; it was not the condemnation of one belligerent by another belligerent, but of a neutral or friendly vessel for a violation of the laws of trade. There is no danger of infringing the rights of belligerents in this case. Courts, too, are disposed to lean in favor of *bona fide* purchasers, and to intend that the decree, under which the purchase has been made, was regular.§ Again, these proceedings appearing to be regular, and the sentence of condemnation having been

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† *M' Masters v*
Shoolbred, 1 *Es-*
pinasse's Cases,
237.

‡ *Henrick and*
Maria, 4 *Rob.*
Adm. Rep. 43.
The Christo-
pher, 2 *Rob.*
Adm. Rep. 209.

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§ 4 *Rob. Adm* 3
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† 2 East, 473.

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† Douglas, 596.

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§ 2 Browne's

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the note, 333.

|| 3 Dallas, 6.

¶ 3 Dallas, 19.

†† Douglas, 596.

pronounced by a court of competent authority, its decision must be conclusive.†

This being a question of prize, belongs properly to the District or Admiralty Court, and is not cognizable here.‡ All questions relative to property sold as prize, and in which the legality of the capture is litigated, belong exclusively to the Admiralty Court.§

[The Court. Do you mean that the District Court of the United States has the exclusive cognizance of questions of this sort?]

Certainly. The plaintiffs here might have filed their libel in the District Court, and the defendants have pleaded the purchase under the decree of the French court. This was done in the case of *Glass v. Sloop Betsey*.||

[Court. But is this the time to raise the objection to jurisdiction, on a motion for a new trial? Why did you not remove the cause into the Court of the United States?]

In the case of *Bingham v. Cabot*,¶ the Supreme Court, on a writ of error from the Circuit Court for the district of Massachusetts, took up and considered the question of jurisdiction. So, in the case of *Le Caux v. Eden*,†† it was not considered necessary to plead this matter specially.

[LIVINGSTON, J. I recollect an action of *trover* brought here for goods condemned in Georgia.]

There are some old cases‡‡ in England, which seem to allow of actions in the common law courts, in regard to property condemned by an admiralty court; but there are cases also to the contrary. If a sheriff or carrier wrongfully sell the goods of another, he may be liable to the owner in trespass or trover; but the property will be divested *by the sale, and may be held by a *bona fide* purchaser.§§

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§§ Bro. Abr.

tit. Trespass,

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Strange, 509.

2 Jones, 114.

|| 2 Bl. Comm.

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¶¶ Coke, 5 Rep.

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†† Harris v.

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††† Flad Oyen,

1 Rob. 135.

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2 Burrow, 694.

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Harison and D. A. Ogden, for the plaintiffs. 1. The rule or custom as to the sales in *market-overt*, which prevails in England, does not exist here. There must be a *market* or *fair* created by *charter* or *prescription*.||| As to the sale in shops, it is confined to the city of London, and even there, it is not every shop that is considered as a *market-overt*.¶¶ This custom forms no part of the common law of this country; nor is it to be admitted that every sale in the course of trade is valid.††† If this rule about sales in *open markets* were general, it would be extremely mischievous, and open a wide door to frauds of every kind.

2. It is a settled principle, that nothing but a sentence of condemnation by a court of competent authority, can divest the original owner of his property.††† In the present case, the proceedings at *St. Jago de Cuba* were a nullity. Though

some countries may have allowed such proceedings, they are not justified by any principle of the universal law of nations; and if injurious to us, we ought not to adopt or sanction the practice. The cases cited from *Robinson's Reports*, are decisions founded on very special circumstances, and must be considered as exceptions, at least, to the general rule. Not an instance can be found of the establishment of an admiralty or prize court in a foreign country. Sir *William Scott* himself lays down the contrary rule in the strongest terms.† Indeed, it would lead to the most monstrous abuse, injustice and fraud, if it should be allowed that captured vessels might be carried into any part of the world, and there condemned, not by the regular court of the captor, or neutral country, but by a consul or agent of the belligerent. If this may be done at *St. Jago de Cuba*, it may be done at *Canton*. The neutral seeking redress must apply to the court taking cognizance of the prize, and put in his claim or appeal; otherwise he is for ever precluded from any remedy or relief. The sale, under which the defendants claim, is very different from that ordered by a regular and competent court, before a condemnation. Such order is a *judicial act, and must issue from a competent court; but the order of a *French* agent at *St. Jago de Cuba* was illegal and void. If so, the right of the plaintiffs could not be divested by such sale, nor transferred to the defendants. In the case of *Nightingale v. Bridges*,‡ an action of trover was brought in *England* for goods taken and condemned by an admiralty court established on the coast of *Africa*, and the court in *England* held the seizure and proceeding illegal. The subsequent condemnation by the court at *St. Domingo* cannot supply the defect in the title claimed by the defendants, under the sale at *St. Jago de Cuba*. He who purchases under an illegal sale, purchases at his peril. If a sheriff should, without authority, sell goods, and afterwards receive an execution against the property of the person whose goods he had sold, this would not render the prior sale valid. The sale at *St. Jago de Cuba* was merely colorable, and a fraud on the neutral rights of this country. The assent of the *Spanish* government does not render such conduct legal towards us. Our government has complained to the *Spanish* court for permitting such proceedings. In the case of the *Flad Oyen*, there was a tacit consent of the *Danish* government, but that was not thought to vary the case.

3. But it is said that this is a question of prize, and belongs exclusively to the Admiralty Court. It is true, that the direct question of prize cannot be decided by the courts of common law. A suit would lie against the captor, for an illegal capture, and if the captor came with his prize within the territory of the *United States*, the Admiralty Court would claim its right of jurisdiction. Where the principal inquiry is, whether a prize or not, it draws after it all incidental ques-

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† *Flad Oyen*,
1 Rob. 135. See
also 8 Term Rep.
2 Co. 1 Rob. 119
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‡ *Showers*, 135

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† *T. Raym.*
173. See also 1

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Ld. Raym. 272.
Shermoulin v.
Sands. March,
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13 *Dallas*, 19.

§ 1 *Boe. and*
Pull. 67. 76.
See also 1 *Salk.*
290. 2 *Levinz*,
113. *Comber-*
bach, 367. *Skinner*, 640. 6 *Term*
Rep. 766.

tions. But the question here is, whether a court of competent jurisdiction has decided that point. If a competent court has decided on the question of prize, its decision is conclusive. There may be many cases in which the courts of common law and admiralty courts have concurrent jurisdiction. In the case of *Hughes v. Cornelius*,† the jurisdiction of the Court of K. B. to decide the question before them, was not doubted. In the case of *Glass v. The *Betsey*, (3 *Dallas*, 6.) the vessel was brought by the captors within our own port, as a prize, and the Admiralty Court was the proper *forum* to decide the question. In the case of *Bingham v. Cabot*,‡ the circumstances are so peculiar that it can have little bearing on this question. Purchasers under a sheriff's sale are no doubt protected; but suppose he sell on an execution issuing from a court having no jurisdiction, would such sale be affirmed? The question then recurs, Was the court competent? Again, a carrier has no authority to *sell* the goods delivered to him; and the owner may maintain his action against the purchaser. The case cited from *Brooke* cannot be law. If a butler, intrusted with his master's plate, sell it, the owner may recover it of the person who buys it. The question is, whether the vendor acts with or without authority; and the purchaser buys at his peril. As to the five bags of coffee, jointly owned by the plaintiffs and master, it is sufficient to refer to the case of *Scott v. Godwin*,§ in which the whole law on this point was considered, and by which it is clear, that one joint tenant or merchant may sue alone, and if it is not pleaded in abatement, no advantage can be taken of it afterwards.

KENT, Ch. J., delivered the opinion of the court. This cause was very ably argued by the counsel, and the several points submitted have received, as they merited, the attentive consideration of the court.

It was contended that a *bona fide* purchase by the defendants at *St. Jago*, for a valuable consideration, and without notice, was equivalent to a purchase in *market-overt* under the *English* law, and bound the property against the party who had right. As no local law is alleged, or proved, this question must be governed by the general principles of the law of sales, which we are to presume, until the contrary be shown, are received and adopted in all commercial countries at *St. Jago* as well as at *New-York*. It was the maxim of the civil law that *nemo plus juris in alium transferre potest quam ipse habet*; and this plain dictate of common sense is considered by *Pothier*|| and **Erskine*¶ as a fundamental doctrine of the contract of sale in *France* and *Scotland*; and there is good reason to conclude, that it prevails in most of the countries in *Europe* which have felt the influence, or obeyed the precepts, of the civil law. Lord Kames, in his *Historical Law Tracts*, tit "*History of Property*," vindicates this principle in the transfer

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|| *Traite du contrat de vente*, part 1. n. 7.

¶ *Institute of the law of Scotland*, vol. 2. 481.

of chattels; and observes, that when notions of property were slight, a *bona fide* purchase of stolen goods gave a good title against the original owner; but that in the progress of society, property acquired such stability and energy, as to affect the subject wherever found, and to exclude even an honest purchaser, when the title of his vendor was discovered to be defective. It was also a principle in the *English* common law, that a sale out of *market-overt* did not change the property against the rightful owner, and the custom of the city of *London*, which forms an exception to the general rule, has always been regarded and restricted by the courts, with unusual jealousy and vigilance. (*Comyn's Dig.* tit. *Market*, E.) The effect of such a purchase made here is not strictly before us, but I have no difficulty in saying that I know of no usage or regulation within this state, no *Saxon* institution of *markets-overt*, which controls or interferes with the application of the common law. (a) The purchase by the defendants did not, therefore, of itself, and without reference to the title of the vendor, give them an indefeasible right to the goods in question.

The original title of the plaintiffs to the coffee being made out upon the trial, and not contested here, we are next to inquire, whether the power and proceedings of the agent of the *French* government, established at *St. Jago*, were competent to authorize a sale of the coffee. This agency would appear to have been a *prize tribunal*, with limited and provisional powers. There was a *procès verbal* received, and examinations taken by its authority, and a survey, sale and deposit of the proceeds ordered, and the agency is stated to have been established for such purposes. *It also appears, that, at the time of the bringing of the vessel into *St. Jago* as a *prize*, and at the time of the sale, *Spain* was a neutral power, and that there had not been any judicial condemnation of the cargo; but only an order of this agency for a provisional sale. I need not question a provisional sale in cases of necessity, (b) under the orders of a competent court; but I deny the legality of the power exercised at *St. Jago*. The object of such tribunals in neutral ports, is probably to facilitate the sale, and increase the profits of prizes; but the object is not to be attained by such means. *Ausis talibus istis non jura subserviunt*. Neutral ports are not intended to be auxiliary to the operations of the parties at war, and the law of nations has very wisely ordained that a prize court of a belligerent captor cannot exercise jurisdiction in a neutral country. All such assumed authorities are unlawful, and their acts void. This was so considered by the *English* Court of Admiralty in the case of the *Flad Oyen*, (1 *Rob. Adm.* 114.) and by the Court of *K. B.*, in the case of *Havelock v. Rockwood*. (8 *Term Rep.* 268.) *Lampredi*† lays down the

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(a) See 13 *Vesey*, Jan. 121.

(b) See *Jennings v. Carson*, 4 *Cranch's Rep.* 3. 16. 27.

† *De Commercio Neutrali*, &c. sec. 14. See also *Azum's Maritime Law of Europe*, vol. 2. p. 254.

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same rule, by saying that the judgment of condemnation ought to be rendered out of the territory of the neutral power. The proper and regular court to condemn, says the highly respected and authoritative *Answer to the Prussian Memorial*, is the court of that state to which the captor belongs; and that questions of prize are, and can be, cognizable only in such courts, and, consequently, that the erecting foreign courts, or jurisdictions elsewhere, to take cognizance thereof, is contrary to the known practice of all nations. (a) The *Austrian* ordinance of neutrality of the 7th of August, 1803, art. 17, refers to and admits as valid, condemnations only by the judicial authorities of the countries of the captors; and the Supreme Court of the *United States*, in the case of *Glass v. The Sloop Betsey*, (3 *Dall.*, 6.) declared, that no foreign power could of right institute any prize court, or judicature of any kind, within the *United States*, unless warranted by treaty. *From these cases, from the reason and fitness of the thing, and from the manifest inconvenience and abuse which would result to neutral rights, as well as to those of the powers at war, from the toleration of a contrary practice, I am satisfied, that the rule which I have stated is correct and just, and supported by the soundest authority. The proceedings of the *French* agency at *St. Jago* are, then, to be put out of view, as being *coram non judice*, and we are to consider the sale as made without any judicial sanction.

Such a naked sale by a captor, even of property professedly belonging to an enemy, is void in law, and incapable of divesting the title of the original proprietor. It is requisite that a sentence of condemnation be given by a court of the sovereign of the captor, before a title to the prize can be transferred. (b) This excellent rule has been long known and established in the *English* admiralty, as appears by the case of *Terremolin v. Sandys*; (*Carth.* 423. 12 *Mod.* 143.) and it seems now to be equally recognized on the continent as part of the law and practice of nations. (The case of the *Flad Oyen*, 1 *Rob.* 114. and of the *Henrick & Maria*, 4 *Rob.* 43. *Heinec. de nav. ob. vet. mer. veh. comm.* sec. 16. *Azuni's Maritime Law*, vol. 2. p. 242.) Our own government, also, adopted the rule during the revolutionary war, and bound itself to observe it. With respect to the capture of neutral vessels under the pretence of a violation of neutral duty, or of contravening the decrees of a foreign government, as was the instance in the case before us, the necessity of a previous trial and judgment is still more urgent and palpable, and that necessity is universally admitted.

We are next led to examine the effect of the sentence of condemnation at *St. Domingo*, subsequent to the sale at *St. Jago*. This sentence was intended to act retrospectively, and

(a) 1 *Peters's Adm. Decis.* 27. 2 *Peters's Adm. Decis.* 345, 346. 3 *Rob. Adm. Rep.* 29. See also *Donaldson v. Thompson*, 1 *Campbell's N. P. Cases*, 429.

(b) See 5 *Rob. Adm. Rep.* 294. 6 *Rob. Adm. Rep.* 194—196. case of *The Falcon* 1 *Bee's Adm. Rep.* 93. 1 *Bay's S. C. Rep.* 478.
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to cure all defects in the proceedings before the *French* agency ; but it does not appear, and from the case we cannot intend, that the proceeds of the *sale under the order at *St. Jago* were deposited in any other place than *St. Jago*, and the admiralty at *St. Domingo* proceeded to exercise jurisdiction over the cargo, and to adjudge it lawful prize, when the subject matter of their sentence was within the territory of a neutral power. An important and delicate question then arises, whether we are bound, in such cases, by the decision of a prize court. (a) Such a court acts *in rem* only, and it cannot exercise a competent or efficient authority, unless it have possession of the subject. Possession must be essential to its jurisdiction. It is the duty of a prize court to give a prompt and fair hearing to all parties, and to restore instantly, if upon a summary examination there does not appear sufficient ground to proceed. But how can this hearing be had, and this restoration made and enforced, when the subject matter in controversy, and perhaps the captors and captured, are in a foreign country ? The admission of a practice so incompatible with the very constitution of a prize court, would lead to the greatest confusion. Suppose a foreign prize court should sustain a libel against a vessel lying within one of our own harbors, and should proceed to try, condemn and sell the same ; would any person hesitate to say that such a jurisdiction was inadmissible ? that such a proceeding was *coram non judice* ? To sustain jurisdiction in such a case would be the height of injustice and absurdity. The old rule, mentioned by *Bynkershoek*, of allowing belligerents to carry their prizes into neutral ports, and to sell them there, was founded on the doctrine that bringing the prize *infra præsidia* did of itself work a transfer of title. But the alteration in the sense and practice of nations, by requiring a judicial condemnation before a change of title can take place, has done away the former indulgence, as incompatible with the new improvement ; an improvement which has become an essential and most salutary control over the exercise of the right of maritime capture. *Valin*, who published his *Commentaries* in 1760, considered it then as *having become the law of nations, that prizes could not be carried into a neutral port, unless in cases of necessity, without a violation of neutrality, and this prohibition was in one of the established ordinances of the marine. (*Ord. de 'a Marine des Prises*, art. 14, and *Valin, ibid.*) Among the regulations of Congress upon this subject, in the year 1781, they acknowledged their obedience to the law of nations according to the general usages of Europe ; and they undoubtedly declared their understanding of those usages, when, in the same year, they ordered all prizes to be kept safe without sale, until they had been passed upon by a competent court, and that all prizes were to be brought for a judicial determination

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(a) See *Rose v. Himely*, 4 Cranch's Rep. 241—253. 6 Rob. Adm. Rep. 138.

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before a prize court within the *United States*, or within the dominion of an ally of *America*. (*Journals of Congress*, vol. 7 68. 189.) The case cited from *March* is interesting, inasmuch as it contains so early a recognition in *England*, of the modern rule, that a prize must be brought *infra præsidia* of the power by whose subject it was taken, or the property would not be altered, and the sale would be void.

Sir *William Scott*, in the case of the *Henrick & Maria*, (4 *Rob.* 43.) admitted, that upon principle, and according to the better opinion and practice, the prize ought to be brought within the ports of the sovereign of the captor, or within those of an ally of such sovereign, and that *possession founded the jurisdiction*; but he observed, that the *English* admiralty had gone too far in sanctioning condemnations in *England*, of prizes abroad in a neutral port, to permit him to recall the vicious practice of the court to the acknowledged principle. We are, fortunately, under no such embarrassment in the present case; and though precedents have controlled Sir *William Scott*, *ego tamen Scevola assentior*,† and we are at liberty to consider the condemnation at *St. Domingo* as void, for want of jurisdiction in the court over the subject. (a)

† *Cicero, Epist.*
ad A. n. 7. 22.

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It has been strongly urged, that this court is concluded by the sentence, and has no authority to inquire *into its extent and force, because the question of prize, and all questions incident thereto, belong to the exclusive cognizance of the admiralty courts. It is a sufficient answer to all this, to observe, that we are not inquiring into the question of prize. The plaintiffs prove a property in the coffee, and the defendants justify under a capture, condemnation and sale abroad; but before the defence can be received, it must appear that the condemnation was by a court having competent jurisdiction in the case, and so far we have, of necessity, an incidental jurisdiction. It would be a monstrous doctrine, to hold that we were concluded by every assumed authority. We are not to examine into the validity of the capture, but we must look so far as to see whether the condemnation was by a tribunal competent to pronounce it in the given case; and if that is once ascertained, I agree that we must admit the defence to be conclusive. (b) In the case of *Oddy v. Bovill*, (2 *East*, 473.) a similar question arose, as to the legality of a *French* prize court sitting in *Spain*, and no objection was raised as to the competency of the Court of *K. B.* to sustain the inquiry; and in the case of *Havelock v. Rockwood*, the same court did not hesitate to declare, that the *French* Court of Admiralty at *Bergen* was illegal. It is the practice of the courts of law, in cases of insurance, to reject the decisions of foreign prize courts, if it appear, that they pro-

(a) See 6 *Rob. Adm. Rep.* 139, note. The decision in the case of the *Henrick & Maria* was affirmed in the *High Court of Appeals*, 5 *Rob. Adm. Rep.* 285. 6 *Rob. Adm. Rep.* 47. S. P.

(b) See 4 *Cranch*, 241. S. P.

ceeded upon local ordinances, or on grounds contrary to the law of nations. (*Mayne v. Walter*, and *Saloucci v. Johnson*, cited in *Park*, and admitted as valid in *Geyer v. Aquilar*, 7 *Term Rep.* 696.) I cannot entertain a doubt but that we have authority to inquire, and are bound to say, whether the foreign court was, by the law of nations, competent to pass the sentence in question, and, having determined that it was not, that such sentence cannot avail in the present case.

The only remaining point in the case is, whether damages ought to have been assessed for the moiety of the coffee which belonged to the plaintiffs conjointly with the *master. This question admits of no difficulty. It appears to be settled in the books, that in actions of trover and trespass, the plaintiff may sue separately for his aliquot share or proportion of interest in a chattel, and that the defendant may give the joint interest of others in evidence, in mitigation of damages, but that he cannot avail himself of the omission of the plaintiff, to unite the other tenants in common with him in the suit, otherwise than by pleading it in abatement. He cannot take advantage of it at the trial. (*Skinner*, 640. 6 *Term Rep.* 766. 7 *Term Rep.* 280. 5 *East*, 420. 1 *Bos. & Pull.* 70—75.)

The hardship of this case upon a *bona fide* purchaser is calculated, upon the first impression, to strike the imagination. It was contended by the counsel, that such purchasers ought to have been favored; but, as an *English* judge has somewhere observed, arguments upon the hardship of a case are only quicksands in the law, which, if admitted, would soon choke and destroy all established principles. A steady adherence to rule in these cases, by requiring the purchaser of captured property to look at his peril to the title, and to derive it under a competent sentence, will tend to check the intemperate avidity and irregular proceedings of belligerent captors.

The opinion of the court, therefore, is, that the defendants take nothing by their motion.

Judgment for the plaintiffs.

FALLS & SMITH, late Overseers of the Poor of New-Windsor, *against* JOHN BELKNAP.

THIS was an action of *debt* on a bond. The cause was tried at the *Orange* circuit, in *May*, 1805, before Mr. Justice *Thompson*.

*The bond was dated the 21st *August*, 1794, and executed by the defendant and one *Thomas Belknap*, now deceased. The condition was as follows: "That if the above bounden

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That a person
is liable to be
rated for the
support of the
poor of a town
does not render
him an incom-

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petrat witness in a cause in which the town is interested as to the maintenance of a pauper. (a) A previous order of a justice of peace is not necessary where security is given by a bond for the maintenance of a bastard child, or helpless pauper; but only in the case of voluntary application of the pauper himself for relief. (b) The question of settlement cannot be tried in an action brought on a bond given to indemnify a town for the support of a bastard child; and the party is estopped by his bond from alleging that the place of settlement was in another town. The surety of such indemnity bond, given to save harmless the town, from time to time hereafter, is holden, after the child has arrived at the age of 21 years, and as long as he shall continue chargeable.

(a) *Bloodgood v. The Overseers of the Poor of Jamaica*, 12 Johns. 385.

(b) See *Candler at al. v. The Mayor at al.* of New York, 1 Wend. Rep. 493.

Thomas Bellknap and John Bellknap, or any of them, their or any of their executors or administrators, do and shall, from time to time, and at all times hereafter, well and sufficiently save, defend, keep harmless and indemnify the above-named *Alexander Falls and Jacob Smith*, overseers of the poor for the time being, of the town of *New-Windsor*, and every of their successors, and also all and every other inhabitant, which now or hereafter shall be of the said town, and every of them, &c., from the educating and instructing, bringing up and providing for a male bastard child of which *E. H.* was some years ago delivered, whereof *T. B.* was the reputed father, and of and from all actions, costs, &c., then," &c. At the trial, a freeholder and inhabitant of the town of *New-Windsor* was called to prove that the town had been damnified, &c. The witness was objected to, on the part of the defendant, as incompetent, but the objection was overruled by the judge, and the witness examined. It appeared in evidence, that the bastard child was and had been since its infancy, so infirm in body and mind, as to be entirely helpless. Prior to the execution of the bond in question, it had been supported by its putative father. In 1795 or 1796, it was placed out by the overseers, under the care of its mother, to whom they agreed to pay the annual sum of 75 dollars for its maintenance; and the child has ever since continued with its mother, who is a married woman, and has been provided with every thing suitable for its support, for the annual sum of 75 dollars, which was admitted to be reasonable. The putative father of the child is dead, and the present defendant paid for its maintenance during one year, since 1795. The overseers of *New-Windsor* paid also for one year, ending *April*, 1801, but it did not appear that any order had been made by a justice or *justices of the peace, for the payment of the said sum of 75 dollars, or any other sum of money by the overseers, for that purpose. It was objected that this evidence did not support the pleadings on the part of the plaintiffs; but the judge overruled the objection. It was then offered, on the part of the defendant, to prove that the child was born the 10th of *March*, 1778, in the town of *Newburgh*, and was, of course, settled in that town by birth, of which the plaintiffs had notice prior to *April*, 1800. This evidence was objected to by the plaintiffs' counsel, and was overruled by the judge, because the defendant, by executing the bond in question, and afterwards paying one year's maintenance of the child, had admitted its legal settlement to be in the town of *New-Windsor*. The defendant then offered to prove, that since the first *Tuesday* in *April*, 1800, he had offered to the overseers of the poor to take the child himself, and support it at his own expense, which they refused; this evidence being objected to, was overruled by the judge. A verdict was then taken for the plaintiffs, by consent, subject to the opinion of the court on a case, in which the above facts were stated.

Fisk, for the plaintiffs. 1. A liability to be rated does not render a person an incompetent witness in such a case.† On general principles, the interest appears too remote to render the witness incompetent. Besides, it is the disposition of courts in more modern cases, to let objections of this sort, where the interest is trifling or uncertain, go to the credit rather than to the competency of a witness.‡ Yet if the rule were otherwise in *Great Britain*, still in this country, where the poor are supported by the fees on tavern licenses, and the penalties created by the act for the regulation of inns and taverns,§ such an objection ought not to prevail.

2. From the second section of the act,|| it will appear that no order was necessary in this case. The justice may issue a warrant, and commit the putative father, until he either give a bond with a sufficient *security, or until he enters into a recognizance to abide and perform such order as the sessions may make. If he does the first, the second is not required. He need not do both. Our statute is copied from that of 6 Geo. II. c. 31. and it has been decided in *England* that no order was necessary.¶

3. Evidence of the pauper's settlement in *Newburgh* was clearly inadmissible in this case. By entering into the bond for the maintenance of the child in *New-Windsor*, the defendant is *estopped*, by his own deed, from alleging a settlement elsewhere.†† If he meant to have availed himself of this objection, he should have suffered the order to have been made, and then have appealed from it, so as to have the question of settlement decided.

4. The offer of the defendant in this case to take the child amounts to nothing. The putative father may take the child, but no authority can be found that permits it to be done by a surety or stranger. But the father must take the child before the order is made; afterwards, it is too late to make his election.‡‡ It has been decided, however, that the putative father has no right to the custody of the child, but it belongs to the mother. §§

5. It may be said, perhaps, that after the child arrives at the age of 21 years, the putative father is discharged from the burden of its maintenance. But there is no limitation of the time for which an order may be made; and in this case the defendant has undertaken, by his bond, to save harmless and indemnify the town for an indefinite period of time.

Sleight, contra. 1. It is true that the *English* courts have decided, that where a person is only liable, but had not been actually rated, he is a competent witness. Our act peremptorily requires each town to support its own poor, and every freeholder of the town to contribute to their maintenance. Certain fees and penalties are ordered to be paid to the overseers of the poor, but it does not follow that rates are not

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† 4 Term Rep.
17. *The King v.*
Prosser. 5 Term
Rep. 667. *King*
v. South Lyme
6 Term Rep.
157. *King v.*
Little Lamley,
Peake's Cases,
153.

‡ 3 Term Rep.
27. *Bent v.*
Baker. 1 Term
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Rep. 300. *Cas.*
temp. Hard. 360.
1 Term Rep. 163,
164. *Carter v.*
Pierce, 7 Term
Rep. 62. *Smith*
v. Sprayer.

§ *Laues of N.*
Y. vol. 1. p. 483,
486.

|| *Ib.* p. 194, 195.

¶ 1 *H. Black.*
253. *Hays v.*
Bryant. Burns,
vol. 1. p. 176,
177. 1 *Botts*, 464.

† *Cro. Eliz.*
755. 1 *Roll*. 408.
872.

‡ 2 *Saund.* 278.
1 *Mod.* 43. 8. C.
1 *Botts*, 458, 459.
2 *Stra.* 1162. 1
Sid. 444. *Sayer*,
93. 3 *Burns*, 201.

§ 5 Term Rep.
278. *King v.*
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† 5 Term Rep.
174. *Burton v.*
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‡ *Douglas*, 7.

§ 1 *Botts*, 403.
2 *Botts*, 22. 29.
31.

‖ *Douglas*, 7.

¶ *Ventris*, 48.
210. *Soyer*, 93.

‡ 2 *Show*. 129,
130.

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necessary, or are not actually assessed on the freeholders. The smallness of *interest does not remove the objection; for if the interest be direct, it renders the witness incompetent.†

2. The language of the act (sec. 1.) is imperative; the justices, if they do their duty, must make an order for the maintenance of the child. From the case of *Simpson v. Johnson*,‡ the propriety and necessity of an order is evident.

3. In 1778, bastards were considered as settled where they were born. The present plaintiffs should have made an order for the town of *Newburgh* to pay for the maintenance of the child, this being a case in which it was improper to remove it.§ If they have voluntarily paid money which they were not bound by law to pay, they have no right to call on the present defendant.||

4. The putative father, with some exceptions, has a right to the custody of the child.¶

[KENT, Ch. J. That is not a question here. It is clear that the surety has no right to the custody of the child.]

5. In the case of *King v. Thomas*,†† it is held that the putative father is discharged, on the child's arrival to twenty-one years of age; the bond in this case should be considered in relation to the subject matter, and the condition is in truth no more than that he would save the town harmless, as long as by law the putative father was liable to maintain the child.

Jones, in reply, was stopped by the court, as to the first four points. In answer to the 5th objection, he contended, that the case of *King v. Thomas* could be intended to go no further than to say that, ordinarily, a child at the age of twenty-one years was competent to maintain itself, otherwise, by a compulsory order, a putative father might be compelled to maintain a child when it was able to provide for itself. In the present case, the child is shown to have been always imbecile and helpless; the reason for the liability of the father continues beyond the age of twenty-one years. This was a voluntary not a compulsory bond, and the language of it is, I will indemnify the town as long as the child continues chargeable. This is its true meaning; besides, there is no rule *of law to limit the duration of a voluntary obligation of this kind. A person may voluntarily undertake to do what the law will not oblige him to perform; and he must be bound by his undertaking.

Per Curiam. 1. That the witness was liable to be rated for the support of the poor of *New-Windsor* was too remote and contingent an interest to render him incompetent. This point has been repeatedly ruled, and is now well settled. (*King v. Prosser*, 4 Term Rep. 7.) (a) 2. The expenditures for the sup-

(a) See, also, 2 *East*, 559. 2 *Evans's Pothier*, 305, 306. 1. *Day's Cases in Error*, 95, S. F.
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port and maintenance of the child, which we are to presume were shown to be necessary and reasonable, were as obligatory on the defendant without, as with an order from a justice. (*Huys v. Bryant*, 1 H. Black. 253.) The section of the act, which requires the previous order of a justice, applies to the case only of a voluntary application for relief, by the pauper himself, and not to indigent and helpless children, or other persons incapable of making application to the magistrate. An order, therefore, was not necessary in this case. 3. The bond of the defendant necessarily implies that the town of *New-Windsor* was properly chargeable with the support of the child, and the defendant having, in pursuance of this bond, paid and indemnified the overseers of that town for one year, he is concluded, by his written obligation, and other acts, from contesting that point. And the town of *New-Windsor*, at this late day, would hardly be permitted to question its own responsibility against another town, and to which the acts of the defendant have contributed. Besides, the question of liability between these two towns cannot be tried in this collateral way. It is sufficient in this suit to show that *New-Windsor* has, in fact, been put to charge and expense for the maintenance of this child. 4. It is unnecessary here to decide whether a putative father is, or is not, entitled to the custody of his bastard child. (See 1 Bos. & Pull. New Rep. 148. *Ex parte Ann Knee*. 5 East, 221. 224. See also 5 Term Rep. 278. 2 Mass. Rep. 109. 2 Wils. 127.) It is enough that a stranger, like the defendant, cannot pretend to any such right. 5. That the child has arrived to the age of twenty-one *years, is not a reason for discharging the defendant from the obligation of this bond, by which he has expressly stipulated to indemnify the town at all times thereafter. The expression *bastard child*, was merely descriptive of the person, and does not import any limitation of the time to which the obligation was to extend.

Judgment for the plaintiffs.

ALBANY,
August, 1905

CURRIE
V.
MOORE

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CURRIE against MOORE.

IN behalf of the defendant, a motion was made for judgment as in case of nonsuit, for not bringing this cause to trial at the last sittings, in *New-York*.

For the plaintiff, an affidavit was read that issue was joined in *March* last, and that if the cause had been noticed for trial, it could not have been tried, as older issues on the calendar of the sittings, were not called on in their turn, or tried.

Per Curiam. The excuse is reasonable and sufficient. The plaintiff omitted to give notice of trial at his peril; but the

In the city of *New-York*, a defendant is not entitled to judgment as in case of nonsuit, for not proceeding to trial, if it appear that the cause could not have been tried in its order on the calendar, had it been noticed for trial.

ALBANY,
August, 1886.

Ree
v.
SPRAGUE.

event shows that the notice would have been of no use, and have created only an unnecessary expense and trouble. The motion must be denied; this must be understood, however, as applicable only to trials in the city of New-York, and with a view to the known course of business at the sittings and circuits in that place.

Rule refused.

STEVENSON against BEECKER, Survivor, &c.

If parties voluntarily submit their cause to referees, the court will not interfere to set aside the report, even on an affidavit of merits.

(a)
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(a) *Johnson v. Parmela*, 17 Johns. 137.

JONES, for the defendant, moved for judgment as in case of nonsuit in this cause, upon a report of referees. After the cause was at issue, the parties agreed to submit it to referees, and that their report should be conclusive; and that if they decided in favor of the defendant, he should be entitled to a judgment of nonsuit.

**Van Vechten*, contra, read an affidavit showing that the report was wrong on the merits of the case. The suit was on a special contract for the delivery of a certain quantity of corn, part of which only had been delivered; the referees would not allow the plaintiff to recover on a *quantum valebat*, as he had failed on the performance of a special contract. (See 4 *Esp. Cases*, 95. 1 *Term Rep.* 134. *Buller's N. P.* 139. *Esp. Dig.* 140.)

Per Curiam. The submission to referees was in nature of an arbitration. The case does not appear to be such as required the examination of long accounts, or proper to be referred under the act. It comes, therefore, within the reason of our decision of *Miller & Underhill v. Vaughan*. (*Ante*, 315.) There is no pretence of misbehavior in the referees, and the parties having agreed that their report should be conclusive, they must abide by it. We give no opinion on the merits.

Rule granted.

RUE against SPRAGUE & CONSAULIS.

After an assignment of errors, it is too late to move for an amendment to the return to a *certiorari*.

VAN YEVEREN moved for leave to withdraw the assignment of errors, and for a rule that the justice amend the return to the *certiorari* in this cause.

H. Bleeker, contra.

Per Curiam The party is too late, after an assignment of

errors, to move to amend the return. Before assigning errors, he ought to have applied to a judge for an enlargement of the rule; and the reasons assigned in his affidavit, for not obtaining such an order, are insufficient.

ALBANY,
August, 1806.
RICHARDSON
v.
BACKUS.

RICHARDSON against BACKUS.

RUSSEL moved to set aside the *capias ad satisfaciendum* in this cause, for irregularity, and that the defendant be discharged from custody. From the affidavit it appeared *that the rule for judgment was entered the 15th day of May last, and the judgment roll filed the 21st day of June. A recognizance of bail in error had been duly entered into in February term last, and on the 23d day of June last, a writ of error was filed with the clerk of this court, and on the same day, notice of the writ and of the bail in error was served on the agent of the attorney of the plaintiff, in Albany; and a like notice was afterwards, on the 4th of July, served on the attorney himself, who resides in the county of Washington. The *ca. sa.* was issued the 26th day of June, on which the defendant was taken the 9th day of July, and imprisoned. It was contended, 1. That the writ of error was a *supersedeas* in this case, and the execution, therefore, irregular. (See 1 Term Rep. 279. *Jacques v. Nixon. Barnes*, 376. 1 Salk. 321. 3 Term Rep. 390. *W. Bl.* 1183. 2 Stra. 867. 1186. 1 East, 662. 2 East, 44. 3 East, 546. *Willes*, 271. 2 *Tidd's Practice*, K. B. 101. *Sellon's Practice*, 578.)

2. The rule for judgment ought not to have been entered until four days after the 15th of May. The defendant has four days in full term before final judgment can be entered. (1 *Sellon's Practice*, 497, 498.)

Shepherd, contra. There can be no doubt that a writ of error with recognizance of bail is a *supersedeas*. The act, however, requires the bail to be put in before the court in which the judgment has been given, before the writ of error can become a *supersedeas*. The defendant ought to have shown in his notice before what authority the bail was taken. The recognizance was entered into during February term, and as the statute requires the bail to be in double the amount recovered, he should have waited until the judgment was perfected. The bail here was put in too soon, and could have no effect; a writ of error is a nullity unless bail be put in within four days after the allowance. (1 Term Rep. 279. 2 Term Rep. 44. 1 *Sellon*, 578.)

Russel, in reply. It was sufficient to give notice that bail was put in, and it was not necessary to state before *whom it

A writ of error may be brought [* 494] before judgment, and bail in error may be put in before a judge at his chambers, and it will be considered as taking effect from the judgment. It is sufficient if the penalty be to the amount of the judgment, and bail cannot gainsay their recognizance. Notice of bail need not state before whom it was taken

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ALBANY,
August, 1806.

JACKSON
v.
HUNTER.

was taken. The plaintiff, if dissatisfied, might have applied to the clerk's office, where the recognizance was filed. A writ of error may be brought before the judgment is entered up. Here the judgment has relation to the first day of *February* term, as will appear from the record.

Per Curiam. The writ of error was a *supersedeas* to the execution. A recognizance taken before a judge at his chambers, is a sufficient compliance with the directions of the act. Though taken after the inquisition, and before the rule for judgment, it is not vitiated. It was during the term, at which the inquisition was returned, and the motion made for judgment. The penalty was to the amount of the judgment, and the bail are estopped from gainsaying their recognizance. It will be deemed as taking effect from the judgment. As the attorney of the plaintiff is supposed to have acted *bona fide*, we shall save him from the consequences of his act. The rule is therefore granted, with the costs of this application, on condition that no action for false imprisonment be brought by the defendant.

Rule granted. (a)

(a) See *Hill v. Tebb*, 4 Bos. & Pull. 238. (or 1 N. R.

JACKSON, *ex dem.* CROSSETT and others, *against* HUNTER.

A mistake of a deputy surveyor under the surveyor-general, not appointed by the parties, in running the boundary lines of certain lots of land in the township of *Aurelius*, was allowed to be rectified so as to give to each party the quantity

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of land, corresponding with their respective patents, and the map of the township on file in the office of the secretary of state. (a)

THIS was an action of *ejectment* for land in the township of *Aurelius*, in the county of *Cayuga*. The cause was tried at the circuit in the county of *Cayuga*, the 26th June, 1805, before Mr. Justice *Tompkins*, when a verdict was taken for the plaintiff, subject to the opinion of the court on the following case.

The lessors of the plaintiff were seised, &c. of lot number 39. and the defendant of lot number 48. in the township of *Aurelius*, and the only point in dispute was the true boundary between the two lots.

On the 25th May, 1802, the following warrant was issued by the surveyor-general of the state, to *Joseph Annin*, a *surveyor, and who was a witness at the trial, to survey two tiers or ranges of lots in *Aurelius*, in one tier of which lot 39. is situated, and in the other tier, the lot 48. adjoining each other: "Whereas, it has been represented to me that the line between the fourth and fifth tiers of lots in the township of *Aurelius*, (counting the tiers from the north bounds of the township,) has not been run agreeably to the map of the said township, filed in

(a) SPENCER,

the office of the secretary of the state, and according to which the grants of the several lots thereof have been made, by reason whereof the lots in the said fourth tier do not, as heretofore surveyed, contain the quantities which they ought respectively to contain: And whereas, it has by law been made the duty of the surveyor-general to lay out the lots in the said township according to the map filed in the secretary's office as aforesaid, you are, therefore, authorized and requested to run a line from the division line between the said fourth and fifth tiers of lots, according to the maps and grants thereof as aforesaid, that is to say, in such manner as that the said fourth tier shall be of the breadth of seventy-seven chains and forty-six links. Whereof make a return," &c.

The line between these two ranges of lots was accordingly run pursuant to the warrant; and it was found, that the line before run gave to the lots in one tier about sixty-eight acres more than six hundred acres, while the lots in the other tier fell so many acres short of six hundred. The new line of division run by the surveyor, Mr. *Annin*, according to the directions of the surveyor-general, gave to the lots in each tier, a square of six hundred acres. It appeared in evidence, on comparison with the field-book of the survey of the township of *Aurelius* in the clerk's office, that one of the distances run exceeded the true distance, upon actual survey, above twelve chains.

The *patents* which were issued for the lots in question, did not describe them by any metes or bounds, courses or distances of lines run, but described them generally, as "known and distinguished on a map of the said township, *filed by the surveyor-general in the office of the secretary of state agreeable to law."

Emott argued the case for the lessors of the plaintiff, and *Woodworth*, Attorney General, for the defendant.

By the laws† referred to in the argument, it appears that on the 28th *February*, 1789, the commissioners of the land-office were authorized to direct the surveyor-general to lay out certain lands, comprehending the premises in question, into townships of 60,000 acres each, and these townships into one hundred lots each, and each lot to be as nearly square as possible, and to contain 600 acres each, and to be numbered in numerical order. One copy of such map was to be filed in the office of the secretary of state, and another in the office of the surveyor-general. The lots were to be then balloted for by the persons who were entitled to them. And the surveyor-general was directed to run the *outlines* of each township, at the expense of the state, and make a map thereof; and on the same map to subdivide the townships into lots of six hundred acres each, one copy of which map was to be filed in the secretary's office, and another in the office of the clerk of the county where the lands were situated; and patents were to issue for each lot agreeably to such map on file in the secretary's office.

ALBANY,
August, 1806.

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v.
HUNTER.

C. J., says, delivering the opinion of the court in *Jackson v. Cole*, (16 Johns. 357.) "that the opinion delivered in *Jackson v. Hunter* cannot be supported."

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† *Greenleaf's* edition of the *Laws of N. Y.* vol. 2. p. 281. a. 1, 2, 3. 5. 7. vol. 2. p. 332. a. 2, 3, 4.

ALBANY,
August, 1806.

JACKSON
v.
HUMPHREY.

Per Curiam. There is an evident mistake made by the deputy surveyor first employed to run the lines, and he was appointed without the consent of the parties. The map filed in the office of the secretary of state, and referred to in the patents for the lots, is correct and agreeable to law. The defendant has got more land, and the plaintiff less, than they ought to have had, by their respective patents. Nothing appears to have been done on the part of the plaintiff, by which he is concluded as to his right to have this mistake corrected. We are, therefore, of opinion, that the plaintiff is entitled to judgment.

Judgment for the plaintiff.

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*JACKSON, *ex dem.* WYCKOFF, against HUMPHREY.

The proof of the execution of a deed cannot be taken by a judge of this state, out of the jurisdiction of the state. The judge before whom the proof is taken is a competent witness to prove that it was done out of the state; but he is not bound to answer any question that may impeach his conduct as a public officer.

THIS was an action of ejectment for a lot of land, No. 42 in the township of *Ulysses*, in the county of *Cayuga*. The cause was tried at the circuit in the county of *Cayuga*, the 27th June, 1805, before Mr. Justice *Tompkins*.

On the trial, the defendant offered to prove by the late judge of the county, before whom the deed of the lessor of the plaintiff was proved by the subscribing witness thereto, that such proof was taken in *Canada*, and out of the jurisdiction of this state. The defendant further offered to prove, that the subscribing witness could not have known the facts respecting the identity of the grantor, as testified by him before the judge who took the proof; and also to impeach the general character of the witness as a man of truth and veracity. This testimony was overruled by the judge, who directed the jury to find a verdict for the plaintiff.

A motion was now made to set aside the verdict, and for a new trial, for the misdirection of the judge.

Emott, for the defendant. The proof offered was not against a record; for the proof of a deed in the manner prescribed by the act is not a matter of record, so as to preclude any averment against it. In *England*, enrolments of deeds are not considered as records.† There is a difference between a *record* and a *thing recorded*.‡ If it be not a record, was the manner of taking it legal? The *proof* of a deed, and its *acknowledgment*, are different. The former must be on the oath of witnesses; the latter is made by the party without oath. The judge had no authority to administer an oath out of this state. The statute gives no such authority. No officer can go out of his jurisdiction to exercise his powers. Suppose the witness guilty of perjury, could he be convicted in this state on an oath taken out of the state? If the judge acted under a mistake,

† *Saville*, 91.

‡ 14 *Viner*, 446.
(E.) pl. 9.

ne is not criminal, and was, therefore, a competent witness; and from the nature of the case, there can be no other. 2. The evidence to discredit the witness ought to have been admitted. *Proof made before a judge in this way, ought to have no greater effect than when it is taken in court in other cases, where you may always offer evidence against the credit of a witness. Considering the numerous officers and magistrates who are authorized to take the proofs of deeds, it will be attended with very pernicious consequences, if it be not allowed to question the credit of the witnesses produced. It is *ex parte* proof, and ought to be considered as no more than *prima facie* evidence, which may be repelled by testimony on the other side.

ALBANY,
August, 1806.

JACKSON
V.
HUMPHREY.
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Henry, contra. The power granted to certain officers and magistrates to take proofs of the execution of deeds, is not a judicial power. It is not *local* in its exercise; it is a mere personal trust and confidence. It is a common practice for judges to take the acknowledgment or proof of deeds out of their counties. On the principle contended for by the other side, the proof of a deed in one county, taken by a judge of another county, would be void. The objection as to convicting the witness in case of perjury is not conclusive; for suppose a witness, who is examined in a foreign country, under a commission from this court, commits perjury, he cannot be punished here. The certificate appears to be endorsed, as if the proof was taken in the county of *Cayuga*. 2. It is true, that an enrolment of a deed is not such a record as imports absolute verity. But it is so far conclusive, that it cannot be avoided by an objection to the witness on whose oath it was proved. The witness may have sworn falsely, and yet the deed be genuine. Its genuineness ought to be impeached by different and higher evidence.

Per Curiam. The judge before whom the proof of the deed was made, was a competent witness to prove that it was done in *Canada*; and if that fact be established, the proof was illegal and void. The oath administered in *Canada* was extrajudicial, and of no validity. (a) The judge had no authority to administer an oath out of the jurisdiction of this state, nor could the witness, in such case, be indicted for perjury. Though the judge was a competent witness, *he would not have been bound to answer any questions impeaching the integrity of his conduct as a public officer. We are of opinion that a new trial ought to be granted, with costs to abide the event of the suit.

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New trial granted.

(a) In 5 *Bos. & Pull.* 57. a *fine* was allowed to pass on the affidavit of the commissioners for taking the acknowledgment of the party in *France*, made before an *English* magistrate then in *France*. In *O'Mealy v. Newell*, (8 *East*, 364.) a party was held to bail on an affidavit made by the plaintiff, in *France*, before a *French* notary public. *Welsh v. Hill*, (2 *Johns. Rep.* 373.) *Hopkins v. Menderback*, (5 *Johns. Rep.* 234.)

ALBANY,
August, 1896.

ORVIS
v.
THOMPSON.

ORVIS *against* THOMPSON, *qui tam*, &c.

The supervisor may associate more than two justices with him as commissioners of excise, and the act of a majority present, is valid. If three, or a majority present, sign the license to keep a tavern, &c. it is sufficient, though the supervisor refuse. It is not indispensable that he should sign the license.

FROM the return to the *certiorari* in this cause, it appears that the plaintiff in error was prosecuted by the defendant in error, *qui tam*, &c., before a justice of the peace, to recover the penalty of 25 dollars for selling strong liquors by retail, without having a license according to the act. (*Laws of N. Y.* vol. 1. p. 484. s. 1. 3.) The defendant below had been appointed and licensed as a tavern-keeper, at a meeting of the supervisor and eight justices and commissioners of excise, by a majority of them present, and his license was signed by five of the justices, but not by the supervisor, who was present, and was requested to sign it. Judgment was given for the plaintiff below against the present plaintiff in error.

Gold, for the plaintiff in error. By the first section of the act, the supervisor of the town, and two justices, are declared commissioners of the excise; or if there be not two justices of the town, or they be absent, the supervisor may associate with him any other justices of the county for that purpose. The supervisor is a mere member of the board of commissioners, and has no authority, or negative, beyond the other members; a license signed by a majority of the commissioners present must be valid.

Platt, contra. The third section of the act requires three commissioners to be present, of whom the supervisor must always be one, and no license can be granted until they, or a majority of them, are satisfied that the person applying for a license is of good moral character, and of competent abilities to be a keeper of a tavern, &c. The license is directed to be under their respective hands and seals, and their proceedings or resolves are to be reduced to writing, and severally subscribed, &c. Though it may not be requisite that all should consent to the license, yet it must be subscribed by all. This being a grant of authority, it must be construed strictly. The supervisor has a negative on the two justices, who have a negative on him. It may have been the duty of the supervisor to dissent, yet without his signature the license is void. If the supervisor and two of the justices had signed the license, it would have been valid, though not by a majority of those present.

2. Again, there is no resolution that the person was of good moral character, nor that any tavern was necessary, &c., which things are required by the act.

3. The board was not legally constituted. The act confides the power to three. If they assemble and deliberate with a greater number, they cease to be a legal board. Mixed

with so many persons clothed with no such authority, they cannot act nor exercise their legitimate functions.

ALBANY,
August, 1806

MILLS
v.
KENNEDY

Gold, in reply. The law intended only that there should be three commissioners at least. A greater number does not invalidate the acts of the board. The supervisor did not select any two present. The essential point is the moral character of the person to be licensed. It would be absurd that two should certify to that fact, and yet three be required to sign the license. The act merely directs the mode of granting the license, that is, it must be signed and sealed. Where a power of a public nature is given to persons who are to be assembled to exercise it, the opinion of the majority must always govern. This is a general principle, recognized by various authorities,† and it is founded in convenience and justice. A contrary doctrine would be productive of very great embarrassment and inconvenience.

1 Bos. & Pull.
229. Co. Litt.
181. b. 2. Burr.
1017. 3 Term
Rep. 592.

Per Curiam. The license produced by the defendant below was valid. The act of a majority of the commissioners of excise was sufficient, and it was so considered in the case of *Palmer, qui tam, &c., v. Downey*, decided in this court, in October term, 1801. The supervisor may, in his discretion, associate more than two justices with him, as *commissioners of excise. The number is not limited by the act to three and no more. The consent of the supervisor is not indispensable. If a majority of the commissioners present sign the license, it is sufficient. The judgment below must be reversed.

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Judgment reversed.

MILLS against KENNEDY.

THIS cause came before the court on a *certiorari*. The defendant in error brought his action against the present plaintiff in error, a constable of the town of *Johnstown*, in the county of *Montgomery*, for not levying certain executions at the suit of the plaintiff in error, and delivered to him to be executed within twenty days after receiving the same, and for not paying the debts and costs in ten days thereafter to the plaintiff, in the manner required by the act, "for the more speedy recovery of debts to the value of twenty-five dollars."‡ The executions were directed to the constables of the different towns in which the defendants resided, and not to the constable of *Johnstown*; but were delivered to the defendant in error to be executed. The justice who issued the executions was removed from office three days after they were issued. It was proved, on the trial below, that all the defendants had

Any constable of the county may serve process under the 25 dollar act, in any part of the county.

† *Laws of N. Y.*
vol. 1. p. 500 &
15.

ALBANY,
August, 1866.

WILSON
v.
MARSH.

sufficient personal property to satisfy the executions if they had been levied, and that before the expiration of thirty days, *Mills* left the executions at the house of the justice, who was then out of office, with a memorandum that he could find neither the property or persons of the defendants, but no return was endorsed on them. The court below gave judgment against the present plaintiff in error, for the amount of the executions so delivered to him to be executed.

Cady, for the plaintiff in error.

Hildreth, contra.

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**Per Curiam*. By the 17th section of the act, any constable may serve process under that act, and the liability created by the 15th section must be considered as coëxtensive with the power of the officer to execute the process. It appears in regard to one of the executions, that the defendant in error was clearly in default, for no cause was shown why he did not levy and collect the money. As to the other executions, the evidence does not appear sufficient to charge him; but the excess of damages here is too small to justify our interference, on the ground of the insufficiency of the evidence to support it, even if we could affirm a judgment in part, given under the 25 dollar act; but on that point we give no opinion. The judgment must be affirmed.

Judgment affirmed.

WILSON against MARSH.

A count on *deceit* in a sale cannot be joined with a *money* count; being *tort* and *assumpsit*, they require different pleas. Where the contract of sale is reduced to writing, you cannot maintain an action on an implied warranty, but only for a *deceit*. See *ante*, p. 414.

THE declaration in this cause contained two counts. The first count stated, that whereas, on the 31st *August*, 1805, at, &c., a certain communication and conversation was had and moved between the plaintiff and defendant, of and concerning certain four obligations or bills for the payment of wheat, (which are set forth in the declaration,) and thereupon the defendant offered to sell and transfer the said obligations or bills to the plaintiff, and to induce the plaintiff to purchase the same, did affirm to him, that the said obligations were good and collectable, and that the obligor was good and sufficiently able to pay, and would pay the same according to the tenor and effect thereof, to which affirmation the said plaintiff gave credit, &c., at the special instance of the defendant, bought the same, &c., and paid to him a large sum of money, &c. upon all which obligations, an assignment in writing was endorsed and executed by the defendant to the plaintiff, and

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to induce the plaintiff to accept the same, the said defendant did *then and there falsely and wickedly allege and represent, that the said obligations, and the assignments thereon, were good and sufficient, &c. Nevertheless, the said defendant, his affirmation, promise and *assumpsit* aforesaid, not regarding, &c., hath not performed, &c., and the plaintiff *avers* that the defendant, at the time, &c., *well knew* that the obligor, &c. was unable to pay and satisfy, &c. The *second count* was for money had and received by the defendant to the use of the plaintiff. To this declaration there was a *demurrer* and *joinder*.

ALBANY,
August, 1866.

WILLIAM
V.
MARSH.

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Emott, in support of the demurrer, contended that the counts in the declaration could not be joined. The first count was on the *deceit* in the sale, for there was no *assumpsit* laid. Being, therefore, in *tort*, it required a plea of *not guilty*, while the second count required a plea of *non assumpsit*. Here he was stopped by the court, who desired to hear the other side.

Gold, contra. This mode of declaring is certainly anomalous; but it has been allowed. The count is on an *implied warranty* in the sale, not on the *deceit*. An affirmation or representation amounts to an implied warranty in law, for which *assumpsit* has of late years been allowed to be a proper mode of declaring; if so, the money count may be joined; and the general plea of *non assumpsit* is sufficient. (2 *East*, 314. *Douglas*, 18. 3 *Term Rep.* 57.)

LIVINGSTON, J. Here is a written assignment. You cannot recover on a *parol* affirmation made at the time, on the ground of warranty. You must go for the *deceit*. (*Ante*, p. 414. *Mumford and others v. M'Pherson and others*.)

THOMPSON, J. All the cases of an affirmation's being an implied warranty, relate to the *title* only, not to the *quality* of the thing sold.

Per Curiam. The first count charges that the defendant made a *false* affirmation *scienter*, and is clearly in *deceit*, and not on any warranty. It states further, that there was a written assignment which contains no warranty. The plaintiff, therefore, could maintain an action only for the *deceit*. The first count requires a plea of *not guilty*, *and the *second, non assumpsit*. Two causes of action, as *tort* and *assumpsit*, which require different pleas, cannot be joined. The demurrer is well taken, and the defendant is entitled to judgment; but the plaintiff has leave to amend his declaration on payment of costs.

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Judgment for defendant.

ALBANY,
August, 1806.

ST. JAMES
v.
GREEN.

Where some evidence has been offered to a justice of the peace, the court will not reverse his judgment, merely because it was too light or insufficient to support a judgment.

ON certiorari. The action below was to recover the amount of a subscription to a school for one year. On producing the subscription-paper, the defendant below denied that he had ever signed, or authorized any person to put his name to it. A witness was sworn, and on his evidence, which was not particularly stated, the justice gave judgment in favor of the plaintiff.

Van Antwerp, for the plaintiff in error.

Ingalls, for the defendant.

Per Curiam. There was some evidence, though, perhaps, not sufficient to support a judgment. We have never gone so far as to say, that where there is some evidence taken, however light, that the judgment ought to be reversed. If we were to reverse judgments on such a ground, there would be no end to writs of *certiorari*. Here is evidence *prima facie*, at least.

Judgment affirmed. (a)

(a) 2 Johns. Rep. 189. 378. 3 Johns. Rep. 435. 439. 4 Johns. Rep. 228

STAFFORD against GREEN.

In an action of slander, on a motion in arrest of judgment, it was held, that if one count in

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the declaration be bad, and the other counts good, and a general verdict, and the judge before whom the cause was tried certifies that the evidence did not particularly apply to the bad count, but went to the other counts, the plaintiff may enter up his judgment on the good counts, on payment of costs

FOOT moved in arrest of judgment in this cause, which was an action of slander. There were several counts in the declaration, in one of which the words charged were, "He swore false before Squire Andrews, and I can prove it." There was no colloquium stated, but a mere innuendo, *that it was in a certain cause depending before a justice, &c. There was a general verdict for the plaintiff, and it was objected that the above words did not amount to a charge of perjury, which consisted in swearing falsely in a matter material to an issue, or point in question, before some court. A person might swear falsely, yet not be guilty of the crime of perjury. It was contended that the count was bad, and not helped by the innuendo, nor could the verdict be amended. (a)

Van Vechten and *Shepherd*, contra, contended, that the old and strict rule of construction had been done away; that words are to be taken in their natural sense, and as they would be understood by the hearers. Though the meaning of the

(a) 1 Caines, 348. *Hopkins v. Beadle*. *Milligan v. Thorn*, 6 Wend. Rep. 412. *Norris v. Durham*, 9 Cow. Rep. 151. *Highland Turnpike Co. v. M'Kean*, 11 Johns. Rep. 98. *Niven v. Munn*, 13 Johns. 49. 13 Johns. 80.

words, in themselves, be uncertain, yet, if, from the circumstances and manner in which they were spoken, it is obvious they were uttered maliciously, and with a view to disparage another, the jury and the court may make the inference, as to their meaning, here put in the *innuendo*. They cited various cases in which the words were equally uncertain, yet held sufficient. (a) Yet if this count were bad, still the verdict might be amended by the notes of the judge, so as to apply it to the good counts. (b)

Per Curiam. The count in question is certainly bad; but as it appears from the judge's certificate that the evidence did not particularly apply to that count, we are of opinion that the judgment ought not to be arrested, but that the plaintiff have leave to enter up his judgment on the good counts, on payment of costs. (c)

Motion denied. (d)

(a) 4 *Bac. Abr.* 504. (old edit.) 3 *Levinz*, 69. 2 *Ld. Raym.* 559. 8 *Mod.* 57. *Cro. Eliz.* 135. 297. 348. 482. 3 *Caines*, 74. *Pelson v. Ward*.

(b) 7 *Term Rep.* 56. 3 *Term Rep.* 659. *Doug.* 376. 1 *Bos. & Pull.* 369. 1 *Caines*, 302—394. 583.

(c) *Douglas*, 371. *Eddoes v. Hopkins*.

(d) See *Backus v. Richardson*, (5 *Johns. Rep.* 478.)

ALBANY.
August, 1806.
HATFIELD
v.
BALDWIN.

HATFIELD against BALDWIN.

OSTRANDER moved for a rule to stay further proceedings in this cause, upon payment of the amount of the verdict with the costs, up to this time, the same having been tendered to the plaintiff.

Henry, contra, read an affidavit, stating that this was *an action of *slander*, in which a verdict was found for the plaintiff, who wished to have it entered up of record, in justification of his character.

Per Curiam. Whenever the defendant tenders the whole amount of the demand of the plaintiff, with all the costs which have accrued, it would be unjust to oblige the defendant to pay further costs, and for no beneficial or necessary purpose.

SPENCER, J., dissented. A tender may be made before the action, or before issue joined, but I know of no rule that obliges the plaintiff to accept a tender after verdict.

Rule granted,

If the defendant, after verdict, tender the amount recovered with all the costs up to the time, the court
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will order further proceedings to be stayed. (c)

(c) See *O'Shield v. De Graaf*, 6 *Cro. Rep.* 63. and 1 *Dunlop's Practice*, 336.

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August, 1806.

FRANKLIN

v.

LAMB.

BURR against REEVE.

PLATT moved to vacate the assessment of damages made by the clerk in this cause, and that the clerk be ordered to assess the same anew, there being an evident mistake in the calculation.

If the clerk make a mistake in the assessment of damages, the court will order him to make another assessment.

Per Curiam. The mistake is apparent, and must be corrected.

Rule granted.

GRISWOLD against LAWRENCE

An agreement to put off the trial of a cause made between the defendant's and plaintiff's counsel, must be in writing, otherwise the court will grant a rule for judgment as in case of nonsuit, for not proceeding.

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† 3 *Caines*, 131.
Brandt v. Berrian.

ROOT, for the defendants, moved for a judgment, as in case of nonsuit, for not proceeding to trial pursuant to notice.

Sherwood, contra, read an affidavit, stating, that the defendant agreed with the attorney and counsel of the plaintiff that the cause should go off without being tried,† and that notice of the agreement was given to the defendant's counsel.

Per Curiam. This agreement should have been in writing; but we would not grant the rule, if it appeared to us that there had been any intention to impose upon or mislead the *plaintiff, his attorney, or counsel. The case cited is not accurately stated in the report.

Rule granted. (a)

(a) See *Dubois v. Roosa*, (3 *Johns. Rep.* 145)

FRANKLIN against LAMB.

The rule for an attachment against a sheriff, twenty days after service of a former rule, applies only to the case of writs, in order to compel the sheriff to return them.

ROOT moved to vacate the rule entered in this cause for an attachment against the sheriff for not bringing in the body of the defendant. On the return of the writ, a rule had been entered that the sheriff bring in the body, &c. in twenty days, or that an attachment issue. Twenty days after service of notice of the rule, a rule absolute for an attachment was entered. No attachment had in fact issued, and the sheriff had put in bail afterwards, and justified.

Sherwood, contra, objected, that the rule having been made absolute, in the vacation, in *July*, 1805, the defendant or sheriff ought to have appeared, and put in and perfected bail, and then applied at the next term for relief.

Per Curiam. The rule for an attachment after twenty days' notice of the first rule, applies only to *writs*. The rule for an attachment in this cause was a mere nullity.

ALBANY,
August, 1806

Matter of
STRATTON
and others.

Motion withdrawn.

GURNEE *against* DESSIES.

ON the return to the *certiorari* in this cause, the only error assigned was, that the justice had refused to admit the evidence of a free black man, as to facts which took place while he was a slave.

The cause was submitted without argument.

Per Curiam. A free black man is a competent witness to prove facts which may have happened while he was a slave. The judgment below must be reversed.

A slave, after he has obtained his freedom, is a competent witness to prove a fact which may have happened while he was a slave.

udgment reversed.

*GRAVES *against* MILLER.

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ROOT moved to set aside a judgment taken by default in this cause, and the subsequent proceedings.

Sherwood, contra, read an affidavit of the service of the notice of a rule for the assignment of errors, on the defendant, by affixing the same in the clerk's office; and stating further that the defendant had removed out of the county.

Per Curiam. The service, in such case, must be either personal, or it should be satisfactorily shown why it was not so, and that it has been left at the party's last usual place of abode.

Service of notice of a rule for assignment of errors must either be personal, or good reason be shown why it is not, and that it has been left at the last usual place of abode of the party, if he has removed from the county

Rule granted.

IN THE MATTER OF STRATTON and others.

IN the matter of *Stratton and others*, on a petition for the partition of lands, the court said, that the general guardian appointed by the *surrogate*, was not sufficient to authorize him to act for the infants, but a new appointment of a guardian must be made by the court under the act.

On a petition for a partition lands under the act, the court must appoint guardian. The guardian appointed by the surrogate is not competent to act in the case.

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August, 1806.

RUN
V.

SPRAGUE &
CONSAULIS.

If the plaintiff consent to go to trial on a bad plea, he cannot, afterwards, set aside the verdict, because the judge at the trial admitted evidence under a plea that did not authorize

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its admission. Whether under a plea of *nil debet* to an action of *debt*, on a judgment, the defendant, on a notice for that purpose, can give any special matter in evidence. *Quære.*

MEYER against M'LEAN, Survivor, &c.

THIS was an action for *debt*, on a judgment recovered in the Court of Common Pleas of the county of *Ulster*. The cause was tried at the circuit in *Ulster*, on the 26th of *June*, 1806.

The declaration was in the usual form. The defendant pleaded *nil debet*, and subjoined thereto a written notice that the defendant would give in evidence under that plea, that an execution had been issued on the judgment, which had been duly levied and paid to the sheriff.

On the trial, after the record had been produced by the plaintiff, the defendant offered the special matter mentioned in the notice to his plea, in evidence, which was objected *to by the plaintiff. This point being reserved, the jury, on the evidence, found a verdict for the defendant.

A motion was now made to set aside the verdict, and for a new trial, on two grounds; 1. That the plea was not an answer to the plaintiff's declaration; 2. If a good plea, it was not such a plea as would authorize the defendant to give any special matter in evidence under it.

Fisk, for the plaintiff.

L. Elmendorf, for the defendant.

Per Curiam. By going to trial on the plea and notice, the plaintiff admitted the plea to be valid, as a general issue. The judge at *nisi prius* is not to decide on the pleadings; and he was right in admitting the evidence. This is an application for a new trial; but why should we award a new trial, if the plea be bad? A new trial is never granted for a defect in the pleadings. The plaintiff should have sought a different remedy.

Rule refused. (a)

(a) See S. C. 2 Johns. Rep. 183.

RUE against SPRAGUE and CONSAULIS, Commissioners of Highways of Charlton.

Actions for penalties under the "act to regulate highways," must be brought in the name of the person who makes the complaint, and be prosecuted according to the 25 dollar act, and not in a summary way.

ON *certiorari*. The suit below was brought by the defendants to recover a penalty for encroaching on the highway, contrary to the provisions of the act for regulating highways. (a) The process issued in the name of the plaintiffs, and required the defendant to show cause why, &c., and not to answer. On the trial, the justice admitted one of the plaintiffs as a witness

(a) Laws of N. Y. vol. 1. p. 569. s. 19, 20.

Shepherd, for the plaintiff in error.

H. Bleecker, for the defendants.

Per Curiam. The proceedings were under the 20th section of the act, which directs, that the penalty is to be recovered in the manner provided by the 19th section, where it is said that the penalty is to be recovered in the name of the person who makes the complaint. And, according to our decision in the case of *Bennett and Ward*, (3 *Caines*, 259.) the suit *should have been prosecuted under the 25 dollar act. One of the plaintiffs was sworn as a witness, and, though a mere *trustee*, he was liable for costs, and so far interested. On both these grounds, judgment must be reversed.

Judgment reversed.

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August, 1806.

CAMPBELL
v.
ARNOLD.

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CAMPBELL against ARNOLD.

THIS was an action of trespass *quare clausum fregit*. The cause was tried at the *Washington* circuit, the 11th June, 1806. On the trial the plaintiff proved, that in the year 1776, he was in the actual possession of the premises on which the trespass was committed; that the defendant entered on the land in question, and cut down, took and carried away thirteen pine trees; that at the time of the trespass, one *Archibald* was in possession of the land, as a tenant under the plaintiff, to whose agent he paid rent. The counsel for the defendant moved for a nonsuit, on the ground, that, as the plaintiff was not in the actual possession of the premises, which were in the occupation of his tenant at the time the trespass was committed, he could not maintain the present action. The objection was overruled by the judge, and the jury found a verdict for the plaintiff.

A motion was now made to set aside the verdict for the misdirection of the judge.

Foot, for the defendant. The question is, whether a landlord can maintain trespass for an injury to the land while his tenant is in the actual possession of the premises. The tenant or immediate occupier alone can maintain *trespass*; the landlord or reversioner may have his action on the case for the injury done to the reversion, but not *trespass*.† The possession of the plaintiff must be entire and exclusive.‡ A lessor cannot maintain trespass for an injury done to his trees.§ All the cases recognize this distinction.

Crary, contra. The tenancy here was a tenancy at will, for as it is undefined, it must be presumed to be at will. The

A lessor cannot maintain trespass *quare clausum fregit*, against a stranger for cutting down and carrying away trees, while there is a tenant in possession. This action can be maintained only by the person who has the possession in fact of the land.

(a) *Wickham v. Freeman*, 12 Johns. 133.

† 3 *Woodeson* 193, 194.

‡ 1 *Term Rep* 430. *Stocks v Booth*, 3 *Burr* 1556, 1524.

§ *Ld. Raym.* 739. *Glenham v. Hanby*

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August, 1806.

SHELDON
V.
CLARK.

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† 6 *Conn. B.*
2 *Roll.* 551.

‡ *Cro. Car.* 187.

§ *Woodfall*, 636.
Cro. Eliz. 30.

|| 4 *Co.* 62, 63.
In this case
there was a
reservation of
the trees by the
lessor.

cases cited were those where the tenants held leases. To entitle a person to bring trespass, it is sufficient if he have the constructive possession. The landlord may determine the estate at will, but if he does nothing to put an end to it, the possession of the tenant is construed to be the possession of the landlord.† The remedy by an action of *waste*, which the landlord has, is by virtue of the statute of *Gloucester*. He has no remedy against a tenant at will for trespass by a stranger. In the case of *West v. Freude*,‡ it was decided, that the landlord might have either an action on the case, or *trespass* against a tenant at will, or at sufferance, for spoiling the premises; *a fortiori*, he ought to have an action of trespass against a stranger. A judgment obtained against another for the same injury would be a good plea in bar to this action.§ A lessee has only a special property in the trees growing on the land; and though he might maintain *trespass* for breaking his close, and spoiling his shade, he cannot for the *trees* themselves, for they belong to the landlord or reversioner.||

Per Curiam. The rule appears to have been long and well established, that there must be a possession *in fact* of the real property to which the injury was done, in order to entitle a party to maintain an action of trespass *quare clausum fregit*. A general property, in the case of real estate, is not, as in the case of personal, sufficient to support this action. Admitting the fee of the land to be in the plaintiff, his remedy for an injury to the freehold must be either against his tenant, or against the defendant, in a different form of action. (3 *Woodeson*, 193, 194. 3 *Lev.* 209. 6 *Bac. Abr.* 566. new edit. and cases there cited.) The verdict must, therefore, be set aside, and a new trial granted, with costs to abide the event of the suit.

New trial granted. (a)

(a) See *Tobey v. Webster*, (3 *Johns. Rep.* 468.) *Hyatt v. Wood*, (4 *Johns. Rep.* 150, 313.)

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*SHELDON against CLARK, senior.

In an action against a person for practising physic against the act, it is incumbent on the defendant to show himself within some of the provisos, and the plaintiff is not bound to negative the provisos, in his declaration.

ON return to the *certiorari*, in this cause, it appeared that an action of *debt* had been brought by the defendant in error against the plaintiff in error, before the justice, to recover the penalty of 25 dollars, for practising and administering medicine, contrary to the act,(a) and without obtaining the certificate, or making such proof as is required by the 1st section of the act. The defendant requested an adjournment, that he might procure two witnesses from the state of *Vermont*, to prove that he

(a) *Laws of N. Y.* vol. 1. p. 449.

practised physic for more than two years before the 1st March, 1797, which was objected to, unless the defendant made the oath, and gave the security required by the 18th section of the act.† The justice proceeded to try the cause. It was proved that the defendant had administered medicine within six months before. The justice gave judgment for the penalty, in favor of the plaintiff, who prosecuted as well for himself as for the people of the county of *Cayuga*.

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August, 1806.

SEERS
v.
GRANDY.

† *Laws of N. Y.*
vol. 1. p. 491.

W. Woods, for the plaintiff in error. 1. The declaration is defective in not stating any time or place, and it does not negative any of the provisos in the act.†

2. The justice proceeded to the trial of the cause, without granting the adjournment requested by the defendant.

3. The evidence does not show any offence committed within the state, or that it was within the jurisdiction of the court.

4. The justice does not adjudge that the defendant has been guilty of any offence, nor does he order one half of the penalty to be paid to the people of the county of *Cayuga*.

† *3 Cases*, 137
Douglas, 345. |
Burr, 148.

Gold, contra. 1. The authorities cited relate only to summary convictions, where a greater strictness is observed.

2. The evidence wanted was immaterial, and was to be obtained from *Vermont*, and was no good reason for the adjournment of the cause.

3. On the return, it appears that the town of *Dryden* is stated to be in the county of *Cayuga*, and when *Dryden* is referred to, it must be intended to be in that county.

4. The act is merely *directory* as it regards *the paying over the penalty, and it was not necessary that it should be so ordered in the judgment. It was not requisite for the plaintiff to negative any of the provisos. The defendant, by resting his defence on a practice for two years, negatived every other ground of defence.

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Per Curiam. The averment that the defendant practised physic contrary to the statute was sufficient; and it was incumbent on the defendant, by his plea, to have brought himself within some of the provisos of the act. As he has not done so, either by pleading or evidence, we are of opinion that the judgment ought to be affirmed.

Judgment affirmed. (a)

(a) See *Bennett v. Hurd*, (3 *Johns. Rep.* 438.)

SEERS against GRANDY.

ON *certiorari* from a justice's court. The errors assigned were, 1. That the *venire* was directed to the constables of *Ar-*

If an attorney
of the defendant
offer to make

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BULKLEY
v.
COLTON.

affidavit of the absence of a material witness, and request an adjournment of a cause before a justice of the peace, the justice ought to receive such affidavit, unless some special cause to the contrary be shown.

gyle, and was delivered to a constable of *Hebron* to be executed; 2. That the declaration contained no *venue*; 3. That the defendant's attorney requested an adjournment, and offered to make oath of the absence of a material witness, which the justice refused; 4. That the return does not state that any oath was administered to the constable who kept the jury.

Ingalls, for the plaintiff in error.

Shepherd, contra.

Per Curiam. The refusal to admit the defendant's attorney to make affidavit of the absence of a material witness, as the ground for requesting an adjournment of the cause, was a denial of right; for in certain cases, where the defendant himself does not appear, his attorney may make such affidavit, especially when no reason is alleged against it. The defence on the merits, afterwards, was no waiver of the defendant's right to an adjournment. For this reason, we are of opinion, that the judgment below ought to be reversed.

Judgment reversed.

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*POTTER against BENNIS.

An action for money had and received, will not lie against an overseer of the highway, to recover back money collected by him of the plaintiff under an assessment by the commissioners of highways, pursuant to the statute.

ON certiorari. The present defendant in error brought an action, before a justice of the peace, against the plaintiff in error, for money had and received to the use of the plaintiff, in order to recover back so much money, which had been assessed by the commissioners of the highways against the defendant, and collected by the present plaintiff, who was an overseer of the highways, pursuant to the statute.

Per Curiam. An action for money had and received will not lie against the overseer of the highways in such a case. If any suit can be sustained, it must be an action on the case, *quasi ex delicto*. It would be inconvenient and vexatious to permit public officers to be sued before a justice in this way without any specific charge of mal-conduct.

Judgment reversed.

BULKLEY, Assignee of the Sheriff of Otsego, against
COLTON, Survivor of COLTON.

A bail-bond was executed in 1804, and the *capias* against

HENRY moved for a rule to stay proceedings in the bail-bond suit. He read an affidavit, stating, that the defendant and *Jonathan Colton*, now deceased, executed a bail-bond to

the sheriff of *Otsego*, in 1804; that *Jonathan Colton* died in 1805; that the present defendant is sued on the bail-bond as survivor; and that the writ issued against him is returnable in this term.

Starr, contra, read an affidavit, by which it appeared, that the *capias ad respondendum* in the original action was returnable in *November* term, 1804; that due diligence had since been used to have the writ on the bail-bond served; that the death of *Jonathan Colton* was not known until a short time before issuing the last writ; that a declaration in the original suit had been long since filed *de bene esse*. He cited *Cowper*, 71. *Barnes*, 112.

**Per Curiam*. It is not the practice of the *English* courts to relieve the bail in a case like the present; but the practice of this court has been to relieve the bail to the sheriff, in all cases, upon the return of the writ against them. (*Coleman*, 57.) The cases cited do not apply here. We see no reason why the bail should not be relieved after the death of the principal, in the same manner as if he were still alive. As this point has not been before settled, and the *English* practice is different, let all the proceedings on the bail-bond be set aside, on payment of costs.

Rule granted.

BINDON against ROBINSON.

THIS was an action on the case. The declaration stated that the defendant dug and made a vault or hole in the public highway, or street, to wit, *John street*, in the city of *New-York*, and did not take care to fill, stop up, or cover the same, nor to place near the same any fence or other thing whatsoever, to prevent any person passing along the said street from falling into the said vault or hole, and that the defendant, in passing along the said street in the night, and not knowing of the said vault or hole, fell into the same, and broke his leg and otherwise injured himself, &c. The defendant pleaded, 1. *Not guilty*; 2. *Protesting* that he was possessed of a certain house in *John street* on the said street or way, and had lawful power and authority to dig the said vault or hole, &c. For further plea, pleaded, that he the defendant did cause to be placed round the said vault or hole, a sufficient fence to prevent, &c., and that the injury complained of by the plaintiff was caused by his own carelessness and fault. To the *second* plea the plaintiff replied, that after the digging the said vault or hole, the plaintiff unavoidably, and against his will, fell into the same, &c., and that the defendant did not take care to fill up,

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BINDON
v.
ROBINSON.

the principal was returnable in *November* term, 1804. In 1805, the principal died, and the bail to the sheriff was afterwards sued, and the writ returnable in this term; the court

[* 516] ordered the proceedings to stay on payment of costs, saying that bail to the sheriff will be relieved in all cases on the return of the writ against them.

The declaration stated that the defendant did not take care to fill, stop up, or cover a certain vault or hole, dug by him in the street, nor to place near the same, a fence to prevent, &c. The defendant pleaded that he did place a sufficient fence, &c. The replication was in the words of the declaration, and concluded with a *verification*. On a demurrer, it was held to be bad, and that the plaintiff ought to have taken issue on the plea. (a)

(a) See *Lake v. Cantino*, 13 Johns. 372.

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V.
BARCOCK.
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stop up, or cover the same, nor to place near the same any fence or other thing whatsoever, to prevent, &c., and concluded with a *verification*. The defendant *demurred to the replication, and assigned for cause of demurrer that it concluded with a *verification*, when it ought to have concluded to the country, &c.

Emott, for the defendant. The replication contains the same facts as were stated in the declaration. There is no new matter in the replication to authorize such a conclusion. The rejoinder, therefore, must have been the same as the plea. The replication ought to have negatived the plea, and concluded to the country.

Henry, contra. There is no dispute about the rules of pleading; the only question is, whether the replication does not contain new matter. The plea merely says that the defendant did put a fence round, &c.; the replication states that he left it uncovered, and the plaintiff did not choose to put the cause at issue on the single fact alone that it was not fenced. He cited 2 *Wilson*, 65. *Douglas*, 58. 3 *Term Rep.* 576. 2 *Strange*, 871.

Emott, in reply. The charge in the declaration is in the disjunctive. If the plea were bad, the plaintiff ought to have demurred to it. Now if the defendant rejoin in the words of the plea, they may go on, *ad infinitum*, without coming to an issue.

Per Curiam. The replication is bad. It states no new matter, and ought to have concluded to the country. The plaintiff, however, may amend his replication and take issue on the plea, upon payment of costs.

BLASDALE against BARCOCK.

A. sold a horse to B, and C. afterwards claimed the horse as [* 518] his property, and brought an action of trover against B. and recovered. B. gave notice of the suit brought by C. to A., who attended with a witness at one court, but the cause was not then tried; and he did not at-

THIS was an action on the case, on an implied warranty in the sale of a horse. At the trial of the cause before Mr. Chief Justice *Kent*, on the 20th of June, 1806, it appeared, that after the plaintiff had bought the horse of the *defendant, one *Snow*, who claimed the property, brought an action of *trover* against the present plaintiff for the same horse, which was tried before the Court of Common Pleas of the county of *Washington*, and a verdict was found against the present plaintiff for the value, with costs. It appeared that the plaintiff had given notice to the defendant of the action brought against him by *Snow*, and that the defendant, with another witness, attended at one court as witnesses for the defendant in that cause, but not at the term in which the cause was actually tried

On the trial of the present cause, the record of the recovery against the plaintiff by *Snow*, in the former cause, was received in evidence. The defendant proved that the horse in question had been attached by him in *Vermont*, for a demand against the plaintiff in the other suit, and that they afterwards agreed to meet and adjust their accounts, and that *Snow* offered to sell the horse to the defendant on certain terms; but it did not appear that the sale was actually completed. Evidence was also given to impeach the character of *Snow*.

The judge charged the jury, that the defendant, by the sale of the horse, warranted it to be his property; and that it was his duty, when the plaintiff was sued by *Snow*, to come forward and defend the suit, as it appeared from the evidence that he had notice of the action; that the record of the recovery of *Snow* against the present plaintiff, though not conclusive evidence, was strong evidence of *Snow's* right; that if the jury believed, from the whole evidence, that the horse was, notwithstanding, the property of the defendant, they ought to find for the defendant; but if it appeared to them doubtful, they might find for the plaintiff the amount of damages and costs, in the judgment in the suit by *Snow* against the plaintiff. (a) The jury found a verdict for the plaintiff accordingly.

Van Vechten and *Foot*, for the defendant, now moved for a new trial; 1. Because the verdict was against evidence; and, 2. For the misdirection of the judge.

*The record was not proper evidence as to the right of the parties in this suit; but if it were evidence as to the right of property, it was not so in regard to damages. To entitle the plaintiff to produce it in evidence, he ought to have proved not only that the defendant had notice of the former suit, but notice also of the time when the cause was actually tried. It was the duty of the plaintiff, at that court, when he found the defendant was not there, to have moved for a postponement of the trial, and not have suffered the cause to have proceeded without any testimony on his part. The least he ought to have done, was to inquire of the defendant as to the means of defence, and have given him due notice to be prepared. Having been so negligent of the defence, he ought to suffer the loss. That the case was doubtful, was not a sufficient reason for the jury to find for the plaintiff.

Shepherd, contra. If the record was improper evidence, it ought to have been objected to at the time of the trial. It is now too late; but, in fact, it did relate to the same subject, and it is to be presumed that the jury in that suit gave their verdict on sufficient evidence. There was sufficient ground for the jury to infer that the defendant had notice of the trial of the cause. As he attended one court, he was bound to ascertain

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tend at a subsequent court, when the trial came on. In an action brought by *B.* against *A.* on the implied warranty as to the title, it was held that the record of the recovery against *B.* by *C.* was proper evidence to the jury; and that the notice of the other suit was sufficient, without giving special notice afterwards of the time of trial. (b)

(b) *Barney v. Dancy*, 13 Johns. 285. *Bartlett v. Campbell*, 1 Wend. Rep. 50, and the cases in note a. Trus-
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tees of *Newburgh v. Galatian*, 4 Cow. Rep. 340. 19 Johns. 286.

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the time when the next court was to sit, and to have been prepared to make a defence.

Per Curiam. The record was proper evidence, for without it the plaintiff could not have shown a legal eviction. The first notice given to the defendant of the other suit brought against the plaintiff for the horse, was sufficient; and he was bound to know all the subsequent proceedings, without a special notice of the time every subsequent court was to be held. There was no misdirection by the judge; and we are of opinion that the plaintiff is entitled to a judgment.

Judgment for the plaintiff.(a)

(a) See 4 Dallas, 436. note.

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*PERRY against WEYMAN.

If the justice before whom a cause is tried is sworn as a witness, and the oath be administered to him by another justice, it is illegal.

ON *certiorari* from a justice's court. The errors assigned were, 1. That the justice refused to admit evidence of payment, on the part of the defendant below; 2. That the justice before whom the cause was tried, was sworn by another justice, as witness in the cause.

Weston, for the plaintiff in error.

Foot, contra.

Per Curiam. The act is positive that the justice, or court, that is, the justice before whom the cause is tried, must administer the oath to the witnesses. The oath administered by the other justice was extrajudicial, and improper.

Judgment reversed

The judgment of conviction under the act for the forfeiture of estates, &c. is considered as the conviction; and where such judgment had been rendered in 1781, but the record was not signed until July, 1783, it was held that the conviction was good, and not within the provisions of the treaty of peace with Great Britain.

JACKSON, *ex dem.* THE PEOPLE, against SNYDER.

THIS was an action of ejectment. On the trial of the cause, the record of the conviction of the attainer of *Francis Pfister*, under whom the lessors of the plaintiff claimed title, was produced, and it appeared that the judgment was signed the 14th July, 1783. It was objected, on the part of the defendant, that as the roll was signed subsequent to the preliminary treaty between *Great Britain* and the *United States*, it was not competent evidence; but the objection was overruled, and a verdict found for the plaintiff. It appeared from the record, that the judgment of conviction had been rendered in July term, 1781, though the record was not signed at that time.

Van Vechten and Foot, for the defendant, now moved to set aside the verdict, on the ground that the record of conviction was signed after the treaty of peace. They contended that the conviction could only take effect from the time the record was signed, and that, as the people claim under the conviction, they must fail in making out a title.

* *Woodworth*, Attorney General, contra. The conviction was complete, and took effect at the time the judgment was rendered, and without signing the record. The forfeiture takes place immediately on conviction, and the person convicted is thereby divested of his property.†

Per Curiam. The only question is, What is to be considered as a conviction? We are clearly of opinion that the judgment of conviction rendered by the court, in 1781, must be deemed the conviction, and being prior to the preliminary articles of peace, the title in the property forfeited became vested in the people.

Judgment for the plaintiff. (a)

(a) See 3 *Johas. Rep.* 151.

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† *Laws of N. Y.*
Greenleaf's ed.
vol. 1. p. 28. s. 8.
2 *Caines*, 164.
Jackson v. Pre
vost.

STEEVENS and WATERS *against* CLANCEY, Assignee of the Sheriff of Montgomery.

THIS cause came before the court on the return to a writ of error to the Court of *Common Pleas* of the county of *Montgomery*. The present defendant in error brought his action against one of the plaintiffs in error, in the court below, on a bail-bond. The declaration stated, that whereas, &c. the plaintiff had sued out of the Court of Common Pleas of the said county, before the judges, &c., the said court then being held at *Johnstown*, in said county, a certain writ, &c. It then stated the arrest, and that the defendants became bail to the sheriff, and executed a bail-bond with a condition, that the defendant *Steevens* should appear before the judges and assistant justices of the Court of Common Pleas, to be held at the courthouse, in *Johnstown*, on the second Tuesday in June then next, &c., and then avers the breach, &c., that the defendant did not appear according to the exigency of the writ, and according to the form and effect of the condition of the said obligation, &c. The defendants below demurred to the declaration, and assigned for causes of demurrer, 1. That the declaration did not sufficiently set forth at what court the defendant was to appear and answer, &c.; 2. That it did not appear at which of the courts of common pleas the defendant was bound to appear, &c. The court below overruled the demurrer, and gave judgment for the plaintiff.

If in a bail bond, the suit court, and place of the defendant's appearance are set forth substantially, it is sufficient

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**Van Vechten*, for the plaintiff in error. 1. As the statute prescribes the style of the court, this ought to be strictly followed. The place appointed for holding the court is at the court-house in *Johnstown*. The bail-bond must be taken in the form of the writ, and if not pursuant to the form prescribed by the act, it is void.

2. The allegation of the breach does not state that the defendant was to appear before a court, but merely to appear before the justices, &c. The words, "according to the exigency of the writ," will not help this defect.

3. There is not sufficient certainty as to the place; it ought to have been averred that *Johnstown* was in *Montgomery* county, for there are other towns, in different counties, of that name

Hildreth, contra. The averment that the party was to appear before the justices, and at the place mentioned in the act where the court was to be held, was sufficient. The defendant is bound to appear according to the exigency of the writ.† The bail ought to look at the writ, to know for what he undertakes. The bail-bond need not be precisely accurate and formal; it is sufficient if it substantially appear in what suit, and at what place the defendant is to appear. All the rest may be supplied by legal intendment.‡

† 2 *Show.* 51, 52.
‡ 2 *Levinz*, 123.
6 *Mod.* 231.

Per Curiam. The bail-bond was sufficiently descriptive and certain as to the court and place of the defendant's appearance. The law only requires that they should be substantially set forth in the bail-bond. (2 *Saunders*, 60, a. b. and the cases cited in the notes.) We think that the declaration was certain enough, as to the court at which the defendant was to appear, and these were all the causes of demurrer on which the judgment was given in the court below.

Judgment affirmed

LIVINGSTON against DELAFIELD.

In effecting a policy of insurance, the broker [* 523] stated to the insurers that the vessel was expected to sail the latter end of September, or the beginning of October. On the morning of the day on which the policy was effected, a vessel arrived, bring-

THIS was an action on a policy of insurance on the ship *Eliza*, at and from *Jamaica* to *New-York*, valued at 8,000 *dollars. The cause was tried at the *New-York Sittings*, the 19th December, 1805, before Mr. Justice *Livingston*.

The *Eliza* was a *British* vessel, and sailed from *Jamaica* the 25th of September, 1801, on her voyage to *New-York*, and foundered at sea in a gale of wind on the 25th of October. The policy, interest and abandonment were admitted. The policy in question was opened on the 16th of November, by the broker, at a premium of 6 per cent. and 2,000 dollars were underwritten, being all that was then ordered. The policy was again opened on the 18th of November, about 12 o'clock
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when the defendant and two other insurers subscribed, and another was about to subscribe, when the news of the loss of the vessel was announced. The order for insurance was given to the broker by the agent of the plaintiff, who, about 10 o'clock in the morning of the 18th of *November*, was advised by the broker to have a larger sum insured, as the vessel would soon be considered as out of time; and he then requested the broker to get 3,000 dollars more insured. It appeared that a vessel had arrived on the morning of the 18th of *November*, in 35 days from *Jamaica*, the captain of which informed the agent of the plaintiff that the *Eliza* had sailed from *Jamaica* about the 3d of *October*, but could give no further information concerning her. The broker, being called as a witness, swore, that he received a written order for the insurance from the agent of the plaintiff, mentioning the time of the vessel's sailing, which was shown to the underwriters, who subscribed the policy on the 16th, and also to those who subscribed on the 18th of *November*. That he delivered this order, with the other preliminary proofs, to the defendant, who soon after returned them to the witness, who delivered them, a day or two after, to the agent of the plaintiff, but he did not examine the papers when they were so returned, to see if the order was among them; though he had since examined them, but could not find it. He said that it was usual to intrust the papers with the insurers, and that they were generally returned all together. Notice had been given, on the part of the plaintiff, to the defendant to produce the order; but on its being called for, *he denied that it was in his possession. The plaintiff's counsel then asked the witness to state the contents of the written order; but this was objected to on the part of the defendant, and overruled by the judge. The witness was then asked whether he did not communicate verbally to the underwriters, what was contained in the written order. This being objected to, the judge ruled that the witness might answer as to any verbal communications to the defendant, concerning the time of the vessel's sailing, though it had been reduced to writing and shown to them. The witness then said that he always laid before the underwriters the order of insurance with the policy; that some looked at them, and some of them did not; that they frequently asked him as to the contents of the order, and he answered them according to the order; that he had no doubt that he had done so in this case, and that he communicated to the underwriters on the 16th of *November*, that the *Eliza* was expected to sail about the last of *September*, or the beginning of *October*; and that he communicated the same information to those who underwrote on the 18th of *November*, because it was his general practice to communicate to them verbally what was contained in the written order of insurance. The premium was an ordinary premium for a vessel not out of time. The agent of the plaintiff did not mention to the broker

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ing information that the vessel insured had sailed about the 3d of *October*, which news was not communicated to the insurers. The court refused to grant a new trial on the ground of its being a concealment of a material fact, after the verdict of a second jury in favor of the plaintiff. (a) A written order for insurance was laid before the insurers by the broker, who, at the same time, verbally communicated to them the facts said to be contained in the order. It was

[* 524] held, that the broker might give evidence of his verbal communication, without producing the order itself.

(a) *The New-York Firemen Ins. Co. v. Walder*, 19 Johns. 513. and the cases there cited.

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the fact, that a vessel had arrived on the morning of the 18th of *November*, bringing information that the *Eliza* sailed about the 3d of *October*, nor was that fact communicated to the underwriters. It appeared, from the evidence of the broker, and several insurers, who were examined, that a vessel which has been out from *Jamaica* 45 days would be considered as out of time, and a higher premium than ordinary would be demanded in such case. Other witnesses testified, that, generally speaking, a vessel which has been out from *Jamaica* 45 days, would be considered out of time, but that it often depended on the course of the winds, and of voyages during the season; that different insurers made very different calculations as to premiums, according to their different views of circumstances. It appeared that, from the 1st to the 19th of *November*, *different vessels had arrived at *New-York* from *Jamaica*, with various passages, from 29 to 45 days.

The judge charged the jury, that it was the duty of the agent of the plaintiff to have communicated to the underwriters, on the 18th of *November*, the information brought by the vessel which had arrived that morning, as to the time when the *Eliza* sailed; but that the materiality of such communication was a question of fact, which the jury were to determine. The jury found a verdict for the plaintiff.

A motion was now made to set aside the verdict, and for a new trial, on the following grounds. 1. That the testimony of the broker that he communicated to the defendant, which was contained in a written paper, was incompetent and inadmissible, as the paper was not produced, nor proved to be in the possession of the defendant; 2. That the material information received by the agent of the plaintiff was concealed, and not communicated to the defendant; 3. That the verdict was against evidence.

Harrison, for the defendant. 1. The testimony permitted to be given by the broker, in this case, is against the established rules of evidence. He did not pretend to recollect any thing but what was contained in the written order for insurance. The papers had been returned by the defendant to the plaintiff, in the usual course of business, and it was, therefore, a fair presumption, that the order in question had been returned and was in possession of the plaintiff's agent, or at least that it was not in the possession of the defendant. Any parol evidence of its contents was, therefore, inadmissible, and was properly overruled by the judge. For if the witness be allowed to state his verbal communications of that order, when his recollection is entirely founded on the perusal of the order itself, it amounts precisely to the same thing as giving parol evidence of the contents of a written paper, in the possession of the plaintiff himself, and which ought to have been produced. The witness states his recollection, too, with some doubt, as

derived rather from the course of his business, than from actual knowledge of what took place. In this way, a very salutary and well *established rule, that inferior evidence shall not be received, when higher and better proof is in the possession of the party, will be easily evaded.

2. In contracts of insurance, the utmost good faith is required. Every circumstance in the knowledge of the assured, which can in any degree influence the mind of the insurer in determining on the premium, or whether he shall underwrite, ought to be fully disclosed.† For this purpose, no circumstance can be more material than the time of the vessel's sailing. This vessel did, in fact, sail on the 25th of *September*; the information given to the underwriters was, that she was *expected* to sail about the latter end of *September*, or beginning of *October*. Now, in the morning of the 18th, before the defendant underwrote the policy, a vessel had arrived, bringing intelligence of her having actually sailed. The *expectation* of the time of a vessel's sailing, which is always uncertain, and generally later than the day mentioned, would furnish a very different ground of calculation to the insurer, than a positive knowledge that she had sailed on a particular day.‡ The information which has been withheld is clearly material; and when connected with the fact of the insurance being ordered after it was received, and with the other suspicious circumstances in this case, the jury were bound to find a verdict for the defendant. The materiality of a communication ought not to be considered as a mere question of fact. The jury have exceeded the bounds of reasonable discretion in deciding that it was not material, and against all the evidence before them. It is, therefore, a case very strongly entitled to the interposition of the court, in the exercise of their powers in granting new trials, and to prevent that injustice which may be done by the erroneous or precipitate decisions of juries.

Johnson, contra. 1. The true object of inquiry was, what information had been given to the defendant, as to the time of the vessel's sailing, that might influence his mind in adjusting the terms of the contract. If the broker did verbally communicate the fact, such communication was altogether independent of the written order, and it was proper *for the witness to state it. If the defendant wished to show that the verbal communication varied from the written order, or if he wished to avail himself of that writing, he ought to have given notice to the plaintiff to produce it. No rule of evidence has been violated in this case. To give parol evidence of a verbal order, made at the same time with a written order, is not giving parol evidence of the contents of a written paper. They are contemporaneous, but distinct communications, though they may be of the same nature. To allow proof to be given of the one, is not giving evidence of the other.

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† *Marshall*, 318

‡ *M^r Andrew v. Bell*, 1 Esp. N P. Cas. 373

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2. There is no doubt that good faith is essential to every contract, and that it is a vital principle in the contract of insurance. Questions of actual fraud, or of the violation of good faith, are, with great propriety, left to the decision of a jury, who can judge from a full view of every circumstance, unembarrassed by technical or artificial rules. From the testimony in this case, it is evident, that the insurers must have made their calculation on the information that the vessel was to sail about the first of October. The information alleged to be withheld, was, that the vessel sailed about the third of October. No particular day was mentioned. Both were substantially the same; the information concealed does not vary from what was before communicated; and if it could have had any effect, it would have been to diminish, rather than to increase the premium. Is it the concealment of a fact that the insurer did not know, nor had any opportunity of knowing, nor any reason to suspect? The arrival of every vessel is regularly entered at the place where the insurers keep their office, and the fact was as likely to be known to them as to the assured. Here is neither a *suggestio falsi*, nor a *suppressio veri*, unless it be deemed a suppression of truth not to communicate information of a fact already communicated and known to the party. Whether the information received by the agent of the plaintiff, on the morning of the 18th of November, was material; and whether such material circumstance was fraudulently concealed from the defendant, were questions on which it was the peculiar province of the jury to decide; for they have always been considered as questions of fact, not of law. After two trials in this cause, and two successive verdicts in favor of the plaintiff, will the court now say, that the jury have made an erroneous conclusion from the evidence before them?†

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† See S. C. 3
Caines. 49.

Per Curiam. The evidence of the broker, of what he communicated verbally to the defendant, was admissible. It was not evidence of the written order laid before the insurers, but of a distinct verbal communication made at the same time; it does not, therefore, come within the rule that parol evidence is not to be given of the contents of a written paper. Whether the information brought by the vessel which arrived on the morning of the 18th of November, was a material circumstance, was a question of fact that the jury were to decide. As they have decided upon it, we are not disposed to disturb their verdict, especially after two juries have said that it was not material.

Judgment for the plaintiff. (a)

(a) In the case of *Littledale v. Dixon*, (4 Bos. & Pull. 151.) the Court of C. B. said, that how far the circumstance concealed was material, was a fact for the jury to decide. And in *Wilkes v. Glover*, (4 Bos. & Pull. 14.) Mansfield, Ch. J., considered the materiality of the concealment a question of fact for the decision of a jury.

It has been held, that what is reasonable notice to an endorser is a question compounded of law and fact, and Lord Kenyon, (5 East, 14, in note.) and Lord Ellenborough, (6 East, 4.) left it to the jury. See also, 1 Schoales & Lefroy, 461. 1 Campb. N. P. 248 S. P.

GENERAL RULE.

Saturday, August 16, 1806.

ORDERED, That hereafter, no person, not being a natural born or naturalized citizen of the *United States*, shall be admitted as an attorney or counsellor of this court.

END OF AUGUST TERM.

CASES

ARGUED AND DETERMINED

IN THE

Court for the Trial of Impeachments

AND

THE CORRECTION OF ERRORS ^(a)

OF THE

STATE OF NEW-YORK,

FEBRUARY, 1806.

SAMUEL BEBEE and AUGUSTUS DIGGINS, WILLIAM KIBBE and WILLIAM HOWARD, Executors of the last Will and Testament of WILLIAM BARLOW, deceased appellants,

against

THE PRESIDENT, DIRECTORS AND COMPANY OF THE BANK OF NEW-YORK, respondents.

E. gave a bond and warrant of attorney to *W.*, who entered up judgment thereon against *E.* in the Supreme Court. *W.* assigned the judgment to *O.* to secure the payment of a debt; *O.* assigned it to *R.*, who again assigned it to *N.* *E.* having paid the whole, or nearly the whole amount of the judgment to *W.*, he acknowl-

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W. assigned the judgment to *O.* to secure the payment of a debt; *O.* assigned it to *R.*, who again assigned it to *N.* *E.* having paid the whole, or nearly the whole amount of the judgment to *W.*, he acknowl-

THIS cause came before the court, on an appeal from an interlocutory order of the Court of Chancery.

The following are the material facts which appeared in the case: On the 15th of *June*, 1800, *Joseph Eden*, in order to indemnify *John Wardell*, a broker, in the city of *New-York*, *against certain endorsements which he had made on the notes of *J. Eden*, and to secure the payment of moneys lent to *J. Eden*, executed a bond in the penal sum of 100,000 dollars,

(a) By the 32d article of the constitution of the state of *New-York*, this court is directed to consist of the president of the senate, for the time being, and the senators, chancellor, and the judges of the Supreme Court, or the major part of them. When an impeachment is prosecuted against the chancellor, or either of the judges of the Supreme Court, the functions of the person impeached are suspended until his acquittal. When there is an appeal from a decree in equity, the chancellor is required to inform the court of the reasons of his decree, but he has no voice in the final sentence. If the cause be brought before the court by writ of error on a question of law, on a judgment of the Supreme Court, the judges of the court must assign their reasons for such judgment, but have no voice in its affirmance or reversal.

conditioned for the payment of 50,000 dollars, with a warrant of attorney to confess judgment thereon. On the 8th July, 1800, by virtue of the warrant of attorney, a judgment was entered up in the Supreme Court, in the name of the said *Wardell*, against *J. Eden*. In order to secure *Nathaniel Olcott*, another broker in the city of *New-York*, the payment of certain moneys lent by him to *Wardell*, the latter assigned to him the judgment thus entered against *J. Eden*. In July and August, 1800, *J. Eden* paid to *Wardell* all the money due on the judgment, except about 467 dollars, which was paid the 6th of October, 1800, and on the 10th of October, 1800, *Wardell* acknowledged satisfaction of the judgment.

About the 24th July, 1800, *Wardell* and *Olcott* settled their accounts together, when the former was indebted to the latter about 25,000 dollars, for which he gave his three promissory notes, payable in 30, 60, and 90 days, which were soon after transferred by *Olcott*, and have since been paid, except the sum of 1,200 dollars, due on one of them. On the 11th of October, 1800, *Joseph Eden* and *Medcef Eden*, his brother, executed to *William Barlow*, now deceased, a bond, in the penal sum of 40,000 dollars, conditioned to pay 20,000 dollars, and a warrant of attorney to confess judgment thereon; upon which bond, by virtue of the warrant of attorney, a judgment was entered up in the Supreme Court. The appellants stated, in their bill in the court below, that they were jointly interested in the judgment, and had never received any satisfaction on it; and that the money on which the judgment of *Barlow* was founded, was loaned to *Joseph Eden*, after the satisfaction of the judgment of *Wardell* against *Eden* had been regularly *acknowledged; this money consisted, according to the testimony of *J. Eden*, of 8,000 dollars in cash, and 12,000 dollars in notes and checks.

The respondents, in their answer in the court below, stated, that *Olcott*, by fraud and imposition, induced one of the tellers, employed in the bank, named *Roe*, to pay certain checks drawn by *Olcott*, on their cashier, to the amount of 120,000 dollars, at a time when *Olcott* had no money, or a very trifling sum, in the bank. To secure *Roe*, and to indemnify him in part, *Olcott*, on the first day of August, 1800, assigned over to *Roe* the bond and judgment against *J. Eden*, which had been assigned to him by *Wardell*. On the 7th of October, 1800, *Roe* (his transaction with *Olcott* having become known) assigned over to the respondents the same bond and judgment, and on the 9th of October, 1800, they gave notice in writing of this assignment of *Joseph Eden*. In October, 1800, the respondents applied to the Supreme Court to vacate the satisfaction acknowledged by *Wardell* of the judgment against *J. Eden*, on the ground of fraud, having given notice of the application to *J. Eden* and his attorney. In April following, the Supreme Court ordered the satisfaction to be va-

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edged satisfaction. The day after the satisfaction had been acknowledged, *B.* and *B.* finding the judgment regularly against *E.* regularly satisfied, lent him a sum of money, and took a bond and warrant of attorney, on which he entered up judgment against *E.* in the same court. *N.* afterwards applied to the Supreme Court to have the satisfaction acknowledged by *W.*, on the first judgment, vacated on the ground of fraud. The court ordered the satisfaction to be vacated, and the judgment to be

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restored; and thereupon *N.* took out a *feri facias* on that judgment, which was levied on the estate of *E.* *B. B.* then filed a bill in chancery against *N.* and others for relief, and to obtain restitution of the money levied on the execution, and in the hands of *N.* On an appeal from an interlocutory order of the chancellor in that cause, it was held, that *E.* having paid *W.* the amount of the first judgment before notice of the assignment, and the same having

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been satisfied on the record, at the time the second judgment was entered up, the latter was entitled to a priority, notwithstanding the subsequent vacatur of the satisfaction.

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satisfaction entered on the first; and the money levied on the first judgment, in favor of *W.*, was ordered to be paid to *B. B.* On an appeal from an interlocutory order of the Court of Chancery, this court will give judgment on the merits of the cause, if the same be brought before them.

cated, (a) *and, thereupon, the respondents caused a *fac. v. facias* to be issued on the judgment, against the estate of *J. Eden*, on which the sheriff returned that he had levied 14,076 dollars and 54 cents, and *nulla bona*, as to the residue of the debt and damages.

*One of the witnesses examined in the court below stated, that when he gave notice of the assignment to *J. Eden*, on the 9th October, 1800, in behalf of the respondents, *Eden* observed that he had paid, during the last sixty days preceding, 40,000 dollars to *Wardell* on account of the judgment; that he knew of the assignment to *Olcott* at the time it was made, and supposed it was intended for security only; but *Eden*, on being examined as a witness, denied that he had received any notice of the assignment.

*In June, 1801, *Beebe* and *Barlow* filed their bill. *Olcott*, who had become a bankrupt, and his assignees, were made defendants to the bill, and answered *separately*; but after filing their answers, they did not, by themselves, or otherwise, appear or join in any of the subsequent proceedings of the cause on the part of the respondents. *Barlow* afterwards

(a) See *Wardell v. Eden*, (a) (*Coleman's Cases*, 437.) where the facts and arguments of the counsel on this application, in October term, 1800, and the rule granted *de bene esse*, for vacating the satisfaction, are reported.

In January term, 1801, a motion was made in behalf of the bank of New-York, that the rule for vacating the satisfaction, entered *de bene esse*, of October term preceding, should be made absolute. A motion was also made by the defendant, that the judgment should be set aside, or that an issue should be awarded, to try the allegation that the bond was usurious, or at least, the truth and validity of the payments made to the plaintiff on the judgment subsequent to the assignment to *Olcott*.

In April term following,

KENT, J., delivered the opinion of the court on both motions. 1. With respect to the first motion, I am of opinion that the *vacatur* of satisfaction, directed at the last October term, ought to be made *absolute*. The assignee of the judgment is to be recognized by this court as the owner, and all acts of the plaintiff subsequent to the assignment, and affecting the validity of the judgment, were fraudulent. He has no more power over the judgment than a stranger; but until the defendant has notice of the assignment, all payments made by him, and all acts of the plaintiff in respect to him, are good. In this case, however, the satisfaction was acknowledged and entered *after* the time that the defendant had notice; consequently, that act is to be considered as void in respect to him, as well as to the purchaser of the judgment. (1 Term Rep. 619. 4 Term Rep. 340. 1 Bos. & Pull. 447. See also *Andrews v. Beecker*, in this court, as to the rights of the assignees of a *chose in action* at law. As to his rights in equity, see 2 Vernon, 540.)

It is proper, therefore, that the satisfaction should be done away, without imposing any terms, as a condition of the *vacatur*; because, in judgment of law, it was an act done in fraud, and against right.

2. The motion on the part of the defendant is to be considered, first, in respect to the allegation of usury. If that charge is now to be investigated, yet the judgment ought certainly to stand to preserve the *lien* that it has created upon the land; and the authorities are clear and decisive, that the proper way to try the question of usury on a judgment, entered by confession, is not by setting aside the judgment, but by awarding a *feigned issue*. (*Burnes*, 52. 277. *Cowper*, 727. 1 Bos. & Pull. 270.)

But I think the court ought not to aid the plea of usury, under the special circumstances of this case. A *bona fide* purchaser is here the owner of the judgment; and although a bond or note, if usurious, may be void in the hands of a *bona fide* purchaser because the statute makes the instrument itself void, yet, the case is varied in respect to a judgment, which is not within the words of the act. There are also grounds in this case, to suspect collusion between the plaintiff and defendant, to defeat the claims of the bank, and that this charge of usury is an after-thought. The parties carried on negotiations, and effected payments from time to time, between the first assignment of the judgment and the 6th of October, the one knowing that the judgment was trans-

(a) See *Brooks v. Hunt*, 17 Johns. 437. 13 Johns. 22.

died, and the names of his executors were, by an order of the court, inserted in the bill in his stead.

In *May*, 1803, the cause was brought to a hearing before his honor the chancellor, who, in *August* following, directed a trial of feigned issues by a special jury, to determine whether *Joseph Eden* had notice of the assignment of the judgment against him, before the 7th of *October*, 1800, and what payments were made by him, when, and to whom, on such judgment previous to his receiving such notice. On the 5th of *July*, 1804, the issues were tried, and the jury, by their verdict, found that *Joseph Eden* had no notice of the assignment of the judgment against him on or before the 7th of *October*, 1800, but that he received notice thereof on the 9th of *October*, 1800, and that he had paid *Wardell* 50,000 dollars on such judgment, previous to his receiving notice of such assignment. At the trial of the cause, the respondents offered *Olcott* as a witness, but he was objected to by the counsel for the complainants: 1. Because he was a defendant in the suit in chancery, and no measures had been taken to have his name struck out of the bill, or for his examination as a witness, saving all

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ferred, and, therefore, acting fraudulently, and the other, acting under circumstances that ought, at least, to put him on inquiry; and, finally, after direct notice to the defendant, they concur in having satisfaction entered to consummate their transactions; and, after failing in their efforts, at the last *October* term, to render the satisfaction valid, they now unite in setting up this new impediment to the claims of the assignee. Under these circumstances I think the court ought not to interfere to help this defence.

3. The next object of the application on the part of the defendant is, for an issue to try the truth and validity of the payments made by the defendant to the plaintiff; and this will depend on the time at which the defendant is to be considered as having notice of the assignment of the judgment. The application for a feigned issue is addressed to the sound discretion of the court. These issues appear, from the cases which I have examined, (1 *Wilson*, 331. *Sayer*, 253. *Barnes*, 130. *Cowper*, 727.) to have been granted only for the information of the court, or where the party is otherwise without relief. In the present case, the party has a regular and competent remedy, as a matter of right, and without a special interference of the court. This is by the writ of *audita querela*, which lies where some matter of discharge has arisen to the defendant subsequent to the judgment. It is true that, in many cases, where the defendant might be entitled to his writ of *audita querela*, the court will relieve, in a summary way, on motion; but, as Lord Holt observed, if the ground of the application be a release, or other matter of fact, it is reasonable to put the party to his *audita querela*, because the plaintiff may deny it; and if he does deny it, the court will not relieve on motion. (a) (1 *Ld. Raym.* 439. 445. 1 *Salk.* 264.)

In the present case, the time of the notice, and, consequently, the validity, as well as the truth of the payment, is contested between the parties, and it is proper that these points should be tried in the ordinary and established mode for the trial of facts.

It is in the power of the court to arrest execution upon the judgment, until the same be revived by *scire facias*, or by action of debt, when the defendant would have an opportunity of pleading the payments. But I see no good reason why the court should act at all in this, more than in any other case, as long as the party has the power to act for himself, and the law has supplied him with the adequate means of obtaining relief, without the special interposition of the court. I am, therefore, of opinion, that the motion on the part of the assignees of the plaintiff, that the vacatur of the satisfaction should be made absolute, be granted, and that the effect of the motion, on the part of the defendant, be denied.

Per tot. Curiam. Rule made absolute. (b)

(a) In *Lister v. Mendell*, (1 *Bos. & Pull.* 428.) Chief Justice Eyre says it is the practice to interpose in a summary way, in all cases where the party would be entitled to relief by *audita querela*. This is, no doubt, true, if it be ascertained that the party is entitled to relief.

(b) 8 C. C. Johns. Cas. 121. 258.

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just exceptions; 2. Because, though discharged as a bankrupt, he was interested in the cause, as his evidence would tend to increase his estate; 3. That he had been guilty of fraud in assigning absolutely a judgment, which he had received as a mere collateral security, and would be, therefore, liable for costs. The second objection was removed by a release from the witness to his assignees of all his right to any surplus in his estate; but on the first and third grounds he was rejected by the *judge before whom the issues were tried. In *March*, 1804, the *postea* having been returned and filed, a motion was made by the counsel for the respondents, for a new trial of the issues, in order to let in the evidence of *Olcott*, who, they contended, ought not to have been excluded. After hearing the arguments of counsel on both sides, his honor the chancellor ordered, "that a new trial be had between the present appellants and respondents, to try the several issues therein directed; that in such trial the present respondents be made plaintiffs, and the present appellants defendants, and that the several payments (if any) made on the judgment before the notice thereof, be endorsed upon the *postea* with the verdict; and that, upon the trial, *Nathaniel Olcott*, one of the defendants, be admitted to be sworn as a witness, notwithstanding his being a party in the cause, saving other just exceptions, if any there should be; and if his testimony be rejected upon the said trial, the causes of rejecting the same are also to be endorsed on the *postea*."

From this order the complainants below appealed to this court. The reasons for the order were assigned by

THE CHANCELLOR. A motion was made on the part of the defendants for a new trial.

It was admitted that *Olcott*, having become a bankrupt, offered to release, at the trial, all his right to his surplus estate.

The judge who presided at the trial certified that he was satisfied with the verdict.

The rejection of *Olcott* as a witness was on the technical ground of his being a party; it was a legal consequence of his situation as such, and the certificate of the judge had no bearing on this point, as the correctness of the verdict, on the evidence admitted, is not questioned.

An important object of the issues had been defeated by this rejection, as the testimony which was intended to be referred to the jury, on the relative credibility of the witnesses privy to the transactions respecting the judgment, *had not been brought into view. This was evidently owing to the mistake or inattention of the defendant; and the reason of his rejection, though a valid one at the trial of the issues, must by me be considered as merely formal. To conclude the parties on t, in a case circumstanced as this is, would be very rigid, as

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no interest or sinister intent can be imagined to induce the parties to risk the consequence of a rejection.

The issues, even in their original form, could not have affected the interest of *Olcott*, for the points referred to the jury expressly related to the payments made to *Wardell*, and the fraud imputed to *Olcott* could not, in any point in which I have viewed the subject, influence the verdict of the jury.

I was, therefore, of opinion, that these considerations ought to prevail in favor of a new trial, unless the defendants had lost their right of applying for one by their *laches*.

The trial was in *June*; the complainants had the verdict in their power, and retained it. As soon as they applied to have the effect of it, they were followed by this motion; this must be governed by the practice which prevails in the Supreme Court. If the party in possession of the verdict does not take the usual rule on the *postea*, the opposite party may, any time before he enters the rule, move in arrest of judgment, or for a new trial, though, otherwise, he is strictly held to the four days.

An order was, accordingly, made for a new trial, but upon payment of costs.

The counsel on both sides then entered into a very wide field of argument on the merits of the case, which is here contracted into as narrow compass as possible.

Baldwin, for the appellants. 1. The appellants, after finding that the judgment to *Wardell* had been satisfied, and the satisfaction acknowledged and regularly entered on record by the person in whose favor it was given, and who had the legal control over it, lent their money to **Eden* on the security of a judgment, and in full faith and confidence, that his estate, as appeared from the records, was unencumbered by any prior judgment. They are, therefore, to be regarded as *bona fide* purchasers, or encumbrancers, for a valuable consideration, without notice of any fraud, and ought not in equity to be postponed, by the restoration of the former judgment at the instance of a secret assignee. Though *Eden* was called on to show cause before the Supreme Court why the satisfaction should not be vacated, the appellants had no notice of the application. The propriety of the decision of that court, in ordering the satisfaction to be vacated, under a view of the facts then before them, is not questioned. But they did not nor could they have intended to decide, that a fair, innocent, intervening judgment creditor, without any knowledge of the fraud, should be deprived of his security, and that unheard, or without being called upon to defend his rights. The respondents were secret assignees, and must have known that the assignor had a legal control over the judgment, and ought to have given some public notice of the assignment, or have entered it upon record. The appellants, therefore, as innocent

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† 2 Vernon, 599.
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ington. 2 Ver-
non, 754. Bo-
thomley v. Fair-
fax. Ambler,
313. Martins v.
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on Equity, 307.
308, 309.

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† 2 Vernon, 693.
765. 1 Vesey,
jun. 249. 4 Ve-
sey, jun. 118.
123. 389. 1 Eq.
Cus. Abr. 44. §
4. 2 Eq. Cas.
Abr. 87. § 7.
and note.

purchasers without notice, stand on higher and better ground than the respondents, who have neglected to give notice, and have a prior and superior right to satisfaction of their judgment.†

2. If *Eden* did actually pay off the judgment given in favor of *Wardell*, previous to notice of any assignment, it will be admitted on all hands, that the appellants ought to prevail.† How is the fact? *Wardell* and *Eden* both swear that *Eden* did pay off the judgment before *Olcott* assigned it; and their evidence is strongly corroborated by the fact of *Eden's* making payments to *Wardell*, which he would not have done, had he known of the assignment. This evidence stands uncontradicted, except by the imperfect and inaccurate recollection of one witness. [He then went into an examination of the testimony of the *witnesses on both sides, to show that there was, in reality, no contradiction, and that the evidence of *Wardell* and *Eden*, as to the payment of the judgment, and the want of prior notice, stood unimpeached.]

3. There was, then, no necessity for awarding an issue to ascertain those facts: nor was such an order proper on any sound principles. *Olcott* admitted, in his answer, that the judgment was assigned to him as collateral security merely; he had, therefore, no right to hold it for any other purpose than the one for which it was made, and the moment that purpose was accomplished, his rights became extinct, and the assignment void. The consideration or object of the assignment was a debt due from *Wardell* to *Olcott* of 25,000 dollars, for which *Olcott* received promissory notes, which were negotiated by him, and were afterwards paid. Even if the notes had not been paid, *Olcott* could not have assigned the judgment for a different purpose, nor could *Roe* have transferred it to the respondents for any other object. The issue was directed to ascertain the fact of notice. But the judgment having been satisfied by the payment of the notes, the question of notice was of no importance, and could not affect its decision, especially, as, if the fact of notice were admitted, the appellants had a superior and prior right to have their judgment paid; for the appellants used all due diligence to know the situation of the estate of *Eden* before they parted with their money to him, and finding it clear of encumbrance, they lent their money upon the security of a judgment which would be a *lien* on that estate. The judgment was assigned to *Olcott*, to secure a previously existing debt, not one contracted on the condition of that assignment; and it was his duty to have given immediate notice to *Eden* of the assignment, in order to prevent his paying over the money to *Wardell*. It is the same in regard to *Roe*. The respondents advanced no money to *Roe*, but found the assignment among his papers after his decease. There was gross neglect in **Olcott* and *Roe*, and though no negligence in fact be imputed to the re-

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spondents, yet they must be affected by the negligence of those under whom they claim; and in this comparison of rights, the neglect of *Olcott* and *Roe* may be justly imputed to the respondents. The *appellants*, therefore, have superior claims to equity.

4. A new trial ought not to have been directed, for the sake of letting in the testimony of *Olcott*, which had been rejected at the former trial, on legal and just grounds. He was a party in the cause, and it is a universal rule that a party in a cause cannot be a witness. It was said, on the other side, that as the issue was between *John Den* and *Richard Fen*, the technical objection to the evidence of *Olcott* could not be made. Such an observation is not entitled to a serious answer in a court of equity. If it were well founded, a *fiction* devised for the purpose of justice would become the instrument of injustice and oppression. If the *respondents* wished to avail themselves of the testimony of *Olcott*, they ought, according to the practice of the court, to have applied to have his name struck out of the bill, or for an order for his examination, saving all just exceptions;† but though three years had elapsed from the commencement of the suit, and nine months from the granting of an order for the trial of an issue at law, no steps were taken to remove this objection to the admissibility of his testimony. Again, *Olcott* was guilty of a fraud in making the assignment after the notes had been paid, and in assigning absolutely what he held as mere collateral security. The consequence of this fraud is to subject him to the costs in chancery.‡ On both these grounds the judge was right in rejecting him when offered as a witness. If so, a new trial ought not to have been granted for the purpose of admitting him. Further, a new trial ought not to be granted to let in testimony which was in the power of the party, and which he did not produce, or which he might have obtained by using ordinary diligence: And *it has been shown that the *respondents* had neglected to take any measures to make *Olcott* an admissible witness, though two regular terms of the Court of Chancery intervened between the first trial and the application for a new one. There has been, throughout, great neglect, and an unreasonable delay on the part of the *respondents*, who have no claim to the indulgence of a new trial, the granting of which is always matter of sound discretion in courts, who are cautious in exercising this power, for it gives the party an opportunity to speculate as to witnesses. It is a well settled principle, that a new trial cannot be granted to admit testimony which might have been produced, where there is no pretence of surprise or fraud. In the case of *Standen v. Edwards*,§ the court refused a new trial, though greatly dissatisfied with the verdict, merely to let in evidence which had been kept back. It may be said, on the other side, that *Olcott* was not kept back, but was offered as a witness; yet the counsel

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p. 7. 2 Chancery Cases, 214‡ Barrett v
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of the respondents must have known that he was incompetent, and could not be received by the judge before whom the cause was tried. Here, too, the judge certified that he was satisfied with the verdict.

5. The *appellants* ought to have been made *plaintiffs*, as they were at the first trial, for the *respondents* are interested to delay the cause.

6. Another objection to the order is, that it directs *Olcott* to be admitted as a witness, though a party; allowing the reasons for rejecting him, if he should be rejected, to be endorsed on the *postea*. Now, as judges may differ in opinion, there may be one trial after another, to the very great delay and injury of the appellants.

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Benson and *Harison*, for the defendants. The history of the transaction, disclosed by the facts in this case, (which were recapitulated and commented on,) exhibits the appearance of mystery and management. The appellants, it is to be remarked, are said to have lent their money, which consisted part in cash, and part in notes and checks, to *Eden*, *on the 11th of *October*, the very day on which the *satisfaction* piece was filed in the clerk's office. This circumstance, in connection with the other facts, was enough to excite a suspicion that the judgment was confessed collusively, and with a view to cover *Eden's* property. There was no delay of payment; no stay of execution. Notwithstanding the notoriety of the conduct of *Olcott* and *Wardell*, and of the application to the Supreme Court to vacate the satisfaction acknowledged by the latter, the appellants waited until the judgment was reinstated, and the respondents had taken out execution and levied to the amount of 14,000 dollars; they then came in, after eight months of silence and inactivity, to claim, and, if possible, to take the money from the respondents. This was enough to induce the chancellor to scrutinize and probe these transactions to the bottom. It was his duty to take every step which could inform his conscience on the subject, and to satisfy his mind whether the appellants had superior equity on their side or not. The respondents are admitted to be *bona fide* and innocent creditors. It is not pretended that they knew or countenanced the prodigality and extravagance of *Eden*, or the frauds of *Wardell* and *Olcott*. The most, then, that can be said in favor of the appellants is, that they are also *bona fide* creditors; and that there is equal equity between the parties. Now, it is a well settled principle, that where the equity is equal, the party having the legal advantage, and in possession, shall retain it. A person who gets possession of a satisfied term, and has the legal estate, will hold against a person having equal equity. It is the same thing where a person, having an imperfect title, gets possession of a recognition. In the case of *Wilker v. Bodington*, cited from 418

Vernon, the complainant came into court to ask a *favor*. Here the respondents are brought into court by the appellants, who ask a *favor*, not the respondents. The court will not grant a *favor* against a party having the legal right. The priority of judgments makes no difference in the equity existing between the parties. Satisfaction is fraudulently acknowledged on a judgment; another judgment is then confessed, and afterwards *the satisfaction on the first is vacated, and shall the intermediate judgment be allowed to gain a preference?

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There is no doubt that payments made to the original creditor, without notice of any assignment, are good. The principal question in the cause is, whether there was a notice or not. On this point there was a contrariety of evidence, and the chancellor very properly awarded an issue to ascertain the fact. *Wardell* was certainly entitled to little credit. He was mistaken in one point at least; and *falsus in uno, falsus in omnibus*. There never was a case in which it was more proper to direct an issue; if the jury, by their verdict, had satisfied the doubts existing in the mind of the chancellor, he would have been prepared to decide on the cause; otherwise, he would direct a new trial for the purpose of gaining that light which he wanted to lead him to a right judgment. As the judge rejected *Olcott* as a witness, the chancellor had not the benefit of his testimony. The judge who presided at the trial, it is true, rejected the witness on legal grounds. But the Court of Chancery had a right to his evidence. The objection to him might be valid at law, but not in equity. The complainant may have a party struck out of a bill, in order to examine him as a witness. All that the defendant can do is, to move to have a party examined as a witness, saving all just exceptions. *Olcott's* name being on the record is no objection to his being a witness in a court of equity. The court of law are not to inquire who are the parties to the suit. They have only to see whether the witness be interested or not. There was no ground for rejecting the witness as a party to a fraud. He assigned merely all his *right and title*, and that was notice to the assignee to inquire into the title; nor was he interested. There could not be any surplus to his estate, and he released any possible interest. It is said he would be liable to costs; but on what pretence? He was a certificated bankrupt; and he would no more be liable for costs, in regard to this transaction, than for the original contract itself. He may be made a party in the suit in chancery, but for discovery only, not so as to subject him to costs. He cannot be liable for any contract previous to his discharge, on the mere *allegation of fraud. For *torts* he may be answerable, but not for any thing arising *ex contractu*.

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In *Tyrell v. Holt*,† which was an issue to inquire as to a *fraud*, a party was admitted to be a witness, and the court

† 1 Atk. 451
Cotton v. Lasterell.

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153.

said, where the party has no interest, he cannot be made liable to costs. *Olcott* could have had no possible interest in the question between the appellants and respondents. But it is said that a new trial ought not to have been awarded, because the respondents might have had the benefit of *Olcott's* testimony, if they had taken proper measures for that purpose. At the first trial, it was not thought necessary by the chancellor to direct *Olcott* to be examined, and he could not anticipate the objection that was made to his evidence. But if there were any neglect or mistake on the part of the respondents, still they ought not to be prejudiced, for a court of equity is not governed by the rigid rules of a court of law; it looks to the substantial justice of the case, regardless of matters of mere form. In the case of *Standen v. Edwards*,† the party wilfully kept back the witness. But had there been any surprise or mistake, a new trial would have been awarded. In the present case, *Olcott* was offered by the party as a witness, and rejected on a ground unexpected to the party. He was, in truth, not to be considered as a real party; he never attended a hearing, nor did any person appear for him; and no decree was sought against him. The objection to the order, that the respondents were made plaintiffs, is of no weight. It was easy to add to the order that the bill should be taken *pro confesso*, unless the cause were tried in a certain time, or it might be tried by *proviso*, so as to prevent delay.

It is true that the court, instead of reversing the order, may examine into the merits of the case, as they appear before them, and give judgment thereon. They did so in the case of *Le Guen v. Gouverneur* and *Kemble*, and *Bush v. Livingston*.

[SPENCER, J. It was so decided in *Coe v. Furman*, in which judgment was given here on the merits.]

But ought not all persons interested to be made parties?
[* 544] * If all proper parties are not before the court, it will not proceed to determine the merits, but send the cause back to the court below. This court will not pronounce a *final* decree in a cause unless they can really put an end to litigation.

Radcliff and *Hoffman*, in reply. The appellants appear before this court, as *bona fide* creditors, for a valuable consideration, and with characters as unimpeached as those of the respondents. When they lent their money to *J. Eden*, they searched the records of the Supreme Court, and found the judgment of *Wardell* to be satisfied. They could do no more. Were they not to rely on the records of the court? Suppose a mortgagee has lent his money, knowing a prior mortgage to be regularly cancelled, shall he be postponed, or excluded, because the first mortgage was fraudulently cancelled? When the motion was made to the Supreme Court.
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by the respondents, to vacate the satisfaction of the former judgment, the appellants ought to have received notice of the application; for it is against every principle of justice, that innocent and *bona fide* purchasers should be thus affected, by the decision of a court unheard. The Supreme Court could do no more than a court of equity; and had the respondents applied to a court of equity to have the judgment restored, the chancellor would have imposed terms, he would have restored their *lien*, but not so as to affect intermediate, *bona fide* encumbrancers, without notice of any fraud. The proceedings in that court cannot, nor ought in equity, to affect the rights of the appellants. The respondents having, against law and equity, obtained possession of the money on the execution, are to be considered as trustees to the appellants. The two, and the only material facts in this cause, the notice and the payment by *Eden* to *Wardell*, are fully before the court, and it is in their power to decide on the merits. All necessary and proper parties appear in the case; there is no possibility of any surplus property, which the assignees of *Eden* can claim; nor can the assignees of *Olcott* have any interest in the cause. Both *Eden* and *Wardell* testify that the payments to *Wardell* were made before the respondents gave notice of the assignment. *Eden* had no motive or interest *in speaking falsely. His evidence is confirmed by that of *Wardell*. *Olcott*, in his answer, admits that the assignment was given to him as security for certain notes, all of which, except about 4,000 dollars, had been paid. He could not assign any other or greater interest than he held in the assignment to him. The payment of the notes put an end to the security; and there is no pretence for saying it was for future advances. After the payment, *Olcott* and his assigns must be considered as holding the judgment as trustees to *Wardell*, the original assignor. If there were any fraud in the conduct of *Wardell*, the respondents must look to their *cestuy que trust*, or to the covenant in the assignment to them, for their relief. An innocent third person, ignorant of these transactions, is not to be prejudiced by them. There is not equal equity in this case; for all the equity is in favor of the appellants, who relied on the judgment to them, and lent their money specifically on that security, which is not the case with the respondents. By the satisfaction of the first judgment, the legal advantage also was on the side of the appellants, who are not to be deprived of it by the subsequent order of the Supreme Court, on a motion in which they were not heard.

[SPENCER, J. By a rule of this court, of 1786, only one counsel can be heard in reply. This rule has not been observed in the argument of this case; but I hope it may be enforced in future.]

TOMPKINS, J The appeal in this cause is from an order of

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his honor the chancellor, awarding a new trial of the feigned issue. The pleadings and proofs being now before us, the counsel, according to the course and practice of this court, have argued the cause at large upon the merits. Independently of the objections to the particular order appealed from, the appellants insist that a feigned issue was unnecessary; and that they are entitled to a decree in their favor, for the following reasons: 1. Because the judgment of *Wardell* was satisfied on record, when the appellants fairly, and for a valuable consideration, obtained theirs; and that they, therefore, have a prior and superior right to satisfaction.

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* 2. Because the right of *Olcott*, and the assignees of the judgment in favor of *Wardell*, was extinguished by the payment of the consideration for which it was given; and,

3. Because the payment by *Eden* was before he had notice of the assignment of the judgment.

If either of these grounds be tenable, it will be unnecessary to decide upon the objections to the form of the order for a new trial. My observations will be confined to the first and second points, both of which I consider as conclusive, in favor of the appellants.

The consideration of *Barlow's* judgment was not impeached by the answer of the respondents, and it was not incumbent therefore, upon the appellants to go into evidence of it. But if such evidence were necessary, it may be collected from the pleadings and testimony. The bill avers a consideration; the answer does not deny it; and the testimony of *Eden*, uncontradicted upon that point, explicitly proves it.

It will not be denied that if any fraud were practised by *Eden* and *Wardell*, against the bank, in the acknowledgment of satisfaction, and the appellants were apprized of it when their judgment was obtained, the first point relied upon by them cannot be maintained. It is, however, alleged in the bill, that *Barlow's* judgment was obtained, when that in favor of *Wardell* was satisfied on record, and upon a supposition that nothing was due thereon. Should it be essential, therefore, to aver in the bill want of notice, the above allegation substantially amounts to it. In my opinion, however, an averment of notice is necessary in those cases only where the party possessing an equitable right applies for relief against such persons as have obtained a legal right. In such cases, to obtain the relief sought, it is essential to aver, that the legal estate was acquired with notice of the equitable right. There it is an affirmative allegation, and susceptible of proof; in this case, it would have been the averment of a negative, which could not have been proved, and, therefore, ought not to be required.

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* The fact of notice was indispensable to support the defence of the respondents, and it therefore became requisite for them to set up and prove that the appellants had notice of the

equitable claim. Accordingly, in the answer, they insist that *Wardell, Eden* and the appellants, combined to deprive the respondents of their security under the judgment to *Wardell*. This charge necessarily implies that *Bebee* and *Barlow* had notice of the assignment to the bank. The replication put that fact in issue; and had it been established by proof, the appellants could not have maintained their first point. What evidence is afforded to establish the fraudulent combination imputed, by the answer, to the appellants? The answer itself is not evidence of notice, because it is not verified by oath, and because, if it had been, it could not be received as proof of matter in avoidance, which can only be established by testimony *aliunde*. Exclusive of the answer, there is nothing in the cause having the remotest tendency to prove the notice or combination charged in it; unless the particular relief, sought for by the bill, is construed into an admission of notice. The relief prayed for is, that an injunction issue, and that the judgment in favor of *Wardell* may stand as a security for such sum only as may appear to be really due thereon from *Eden*. The specific relief prayed is not set forth in the case presented to this court; nor have the counsel for the respondents argued the cause upon the ground that an admission of notice is thereby implied. Had the respondents entertained an opinion that notice was conceded by the bill, it is to be presumed that they would have relied and insisted upon it in their answer as a conclusive defence. But whatever might have been their impression on that point, it is sufficient to say, that admissions which will conclude a complainant, are only to be sought for in that part of the bill which contains the state of the case, or title, upon which he relies for relief. Even a mistake in the special prayer of the bill, provided there be a general prayer for such other relief as the nature of the case may require, as there is in this bill, will not deprive the party of that relief to which the nature of his case entitles him. (*Mitford*, 38. *2 *Mod.* 91, 92.) If, therefore, in this case, the appellants, when they filed their bill, were advised that the particular relief solicited by them was the utmost they could obtain, in consequence of the order of the Supreme Court, in relation to *Wardell's* judgment, that misapprehension of their rights ought not to prejudice them. They are, therefore, in my opinion, to be regarded as *bona fide* encumbrancers, without notice, for a valuable consideration, and their prior right to satisfaction is evident, unless the proceedings of the Supreme Court, in vacating the satisfaction of the judgment to *Wardell*, deprives them of that right. The effect of those proceedings will now be considered.

The respondents, being assignees of a *chose in action only*, never possessed a legal *lien* upon the property of *Eden*. Subsequent to the entry of satisfaction, they surely had no such *lien*; and it is equally indisputable that *Barlow's* judgment,

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obtained prior to the order to vacate the satisfaction, did give him a legal *lien*. When the Supreme Court interposed its authority, it assumed equity powers; and the proceedings there cannot be deemed to have any greater operation than a similar interference of the Court of Chancery would have had. It is an invariable rule in equity, that where one party has obtained a legal advantage, and in equity is equal, not to disturb the legal right. In this case the appellants had not only fairly obtained a legal superiority, but appear to me to have had the equity on their side, inasmuch as they loaned their money expressly upon the security of their judgment; whereas the bank obtained their assignment to avert, if possible, the loss of a previously existing debt, created by the imprudence of their agent. Under such circumstances, it is not to be presumed that the Court of Chancery would have postponed the legal *lien* of a party not before the court, having no notice of its proceedings, and not heard. Both the counsel and the Supreme Court seem to have viewed the effect of the order to vacate the satisfaction of *Wardell's* judgment in the same light in which I have considered it; because a leading reason assigned to induce that court summarily to interfere, **was, to prevent the intervention of new liens*. But it would not have been material to press an immediate *vacatur* of the satisfaction, if such new *liens* would not have been entitled to prior satisfaction. The court intended to place *Eden, Wardell*, and the assignees of *Wardell's* judgment, who were the only parties before them, *in statu quo*; and to give their order a greater operation, or to conclude third parties by it, would produce manifest injustice. They surely never intended to decide upon the rights of persons who were without notice of the application, and unheard.

With respect to the second point, it is observable, that *Olcott's* answer admits the truth of *Wardell's* testimony as to the object of the assignment to *Olcott*. The judgment was to be held by him as collateral security only. Neither this fact, nor the fact of payment by *Wardell* to *Olcott*, of the debt intended to be secured, will be affected by the determination of the feigned issue. We must, therefore, decide them upon the proofs as they now stand. I have before observed, that *Wardell* and *Olcott* unite in saying that the assignment was made for a specific purpose only. But they are at variance in regard to the sum intended to be secured, and with respect to the payment of that amount. Upon this point, however, *Wardell* is clearly entitled to credit. He not only specifies the particular notes which the assignment was intended to secure; but, in his account with *Olcott*, states to whom they were transferred and paid. This enabled the opposite party to detect the falsehood, if any, in the relation of *Wardell*. On the other hand, *Olcott's* answer contains a mere averment of a conjectural balance, at the time of the assignment to *Roe*, without

referring to any accounts, admissions of *Wardell*, notes, or other documents, to support the truth of his statement. Besides, to gloss over his conduct in regard to *Roe*, must have been a powerful motive operating on his mind. If he had admitted that nothing was due from *Wardell* to him, when he assigned the judgment, he would thereby have charged himself with a gross imposition upon *Roe*.

*To avoid this imputation, he introduces his belief, at that time, which belief is not, afterwards, fortified by any documents or proof.

The purpose of the assignment, and the payment of the consideration of it by *Wardell*, are, to my mind, satisfactorily established.

In *Davies v. Austen*, (1 *Vesey*, jun. 249.) it is laid down, by the lord chancellor, as a universal rule, that a purchaser of a *chose in action* must always abide the case of the person from whom he buys. If, then, the consideration, for which the judgment was assigned to *Olcott*, were satisfied, all his right was extinguished; and, therefore, *Roe* and the respondents, according to the rule laid down in the above case, acquired no right by the assignments, if they were made after payment by *Wardell*; and if the notes were paid subsequent to those assignments, that payment extinguishes their right.

I am, therefore, of opinion, that a feigned issue was unnecessary; and that, as the respondents have, by their answer, admitted the receipt of the proceeds of *Eden's* real estate, they are to be regarded as trustees for the appellants, for the amount due upon the judgment, in favor of *Barlow*, and ought to account for the same accordingly; and that the order of his honor the chancellor, awarding a feigned issue, must be reversed.

SPENCER, J. I forbear to repeat the facts and circumstances of this case; they have been so often mentioned, that no member of the court can be unacquainted with them.

The Supreme Court, in vacating the satisfaction of the judgment of *Wardell* against *Eden*, exercised a jurisdiction, until very recently, within the acknowledged province of a court of equity alone. The protection of the rights of an assignee of a *chose in action* by courts of law is, perhaps, essential to the administration of justice; it certainly avoids great expense and delay to suitors, and it, therefore, as far as this case goes, meets my decided approbation. (a) But when a court of common law does interpose, to protect a party vested only with an equitable right, and such interposition affects the rights of third persons, some known standard must be resorted to, to test the effect of their proceedings. There is none so appropriate as that furnished by considering the proceeding as having taken place in a court of equity. It is a universal and

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(a) Mr. Justice *Spencer* was not, at that time, one of the judges of the Supreme Court.
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established principle, as well in that court as, indeed, in all others, that no man is to be condemned unheard; the rights of no one can be immediately affected by a judicial proceeding, to which he is not a party. This proposition is so just and essential, that I should think it weakened by citing authorities in its support. It comes home to the common sense of every man: it is, and it must be, a first principle. The appellants or those they represented, were never called on by any citation or process, to defend their rights before the Supreme Court, when the satisfaction was vacated. The respondents' counsel, unable, and, I trust, unwilling, to assert that the order of that court affected a party not before it, resorted to reasoning to induce this court to believe the appellants guilty of *laches*, in not appearing, and as thereby forfeiting their rights, because they might have heard of the pendency of the motion to vacate the satisfaction. It would, I think, be extravagant in this court, to suppose a fact, which, if it were material, and could be proved, has not been made out. It would be introducing a new principle in judicial proceedings, to require of a party to volunteer his appearance. This objection is so obviously untenable as to require no further notice.

As it regards the appellants, then, I consider the satisfaction of the judgment as unaffected by the proceedings between the bank and *Eden*. It follows, that the appellants have the legal *lien* on the real estate of *Eden*. It then remains to be examined, whether the appellants have equal or superior equity to the respondents. If it should appear that they have either, their right to the proceeds of the real estate of *Eden*, to the extent of their judgment, necessarily results. It has been urged that the circumstance of *Barlow's* lending money to *Eden*, on the very day the satisfaction was entered, affords suspicion. I agree that it is a circumstance somewhat extraordinary; but I do not think it warrants me in imputing to them an act of fraud on the party: fraud is odious, and not *to be presumed. Had there been no proof of the money advanced by *Barlow*, I should consider the giving the bond, and confessing judgment, as *prima facie* evidence of the fairness of the debt; but when we rec to the evidence, we find *Joseph Eden* testifying expressly that *Barlow* lent him 8,000 dollars in cash, and his notes and checks to the amount of 12,000 dollars more. This testimony is uncontradicted, and it being an important fact in the cause, the respondents, if they would have controverted it, should have gone into adequate proof. In vain are we told, that *Barlow* and *Beebe* were men of bad characters, and incompetent to advance to *Eden* to that amount. These are facts which must be proved, before they can produce any effect; whilst they rest on suggestion, they can have no influence.

It is to be observed, that the bank got hold of the assignment of *Wardell's* judgment against *Eden*, as a plank by which

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to save themselves from the losses sustained from *Roe*, who obtained it to mitigate the loss occasioned by *Olcott*. Neither the bank nor *Roe* made any advances on the faith of that assignment. As it regards the appellants, it was not until after search at the proper office, that they advanced their money on the faith of the security afforded by the real estate of *Eden*. When the appellants gave credit to *Eden*, they had a *lien* on his real estate. This *lien* has been taken away, but in such a manner only as to change the remedy; it still exists in the view of a court of equity. The appellants having equal, and, I think, superior equity to the respondents, and having the legal preference, I consider them entitled to the proceeds of the real estate of *Eden*, on every principle of justice and equity. And here I might terminate my inquiries; but the importance of the cause, both as to principle and value, demands of me the examination of some other points.

It is material, in ascertaining the rights claimed by the bank, to consider the nature and effect of the assignment by *Wardell* to *Olcott*, that by him to *Roe*, and by *Roe* to the bank.

It is an incontrovertible proposition, that the assignee of a *chose in action* takes it subject to all the equities it was *liable to in the hands of the assignor; or, in plainer language, the "purchaser must abide by the case of the seller." (2 *Vernon*, 192. 1 *Eq. Abr.* 45. 1 *Vesey*, jun. 249.)

The reason and justice of this rule is obvious; the holder of a *chose in action* (excepting such as are made negotiable for the advancement of commerce) cannot alienate any thing but the beneficial interest he possesses; he cannot vest the legal right to sue for, and enforce, in the name of the assignee, the payment of a debt, secured by a bond or judgment. When, therefore, *Wardell* made the assignment to *Olcott*, he took the judgment, subject to all equities existing between *Eden* and *Wardell*; and when the subsequent assignments were made, *Roe* and the bank, respectively, assumed the situation, and stood in the place of *Olcott*, as related both to *Wardell* and *Eden*. It would be absurd to pretend, that because the assignment to *Olcott* was general in its terms, he could, therefore, transfer a greater interest than he held in the judgment. Had *Roe* and the bank, instead of taking the assignment for better or worse, and with the hope of realizing something, which they clearly did, made advances to the whole amount, the legal consequence would be the same. In the present case, they have not the pretext for saying they were imposed on by the generality of the assignment to *Olcott*, because they gave no new credit. A bond, on which there are no endorsements, carries on its face strong presumption, if it be a recent one, that it is unpaid; still, an assignee must abide by the case of his assignor, if it has been paid. If it be illegally obtained, the obligor will avoid it. It becomes necessary, then, to inquire for what pur-

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pose the assignment was made to *Olcott*, and whether that purpose had been satisfied.

Wardell is the only witness who speaks directly to these facts; he says, that the judgment was assigned to secure to *Olcott* the payment of 25,500 dollars he then owed him, and for which he also gave three promissory notes; that these notes *Olcott* negotiated, and that they have been paid, or, at all events, *Olcott* is not responsible on them, as an endorser. In support of the fact, that the judgment was assigned only as a security for the notes, he presents an account current with *Olcott*, by which there appears a balance due to *Wardell*.

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*To oppose these facts, *Olcott's* answer is resorted to. It admits the fact that the assignment was made to secure the notes, and that they have been negotiated; but it asserts, that it was also to secure to him future advantages and responsibilities; and he adds, that *Wardell*, being indebted to him, as he believed, at least in 20,000 dollars, and he being indebted to *Roe*, he made the assignment, as a security to him. If *Olcott's* answer receive all the credit due to the deposition of a witness, and his character and conduct had been fair, still I think *Wardell's* testimony entitled to superior credit. He furnishes his *data* for saying that he owed *Olcott* nothing beyond the three notes. On the other hand, whether *Olcott*, in stating the debt from *Wardell*, includes in his estimate the notes, or on what grounds he made the assertion, we know not. He has produced no books, no documents, to support him; but is vague and indefinite. *Wardell's* competency, as a witness, has been questioned; I perceive no reason to doubt either his competency, or his disinterestedness; his interest, if any, is to uphold the judgment, and his testimony goes to destroy it. He then swears against his interest, and this, instead of invalidating, strengthens his credit. It is alleged, that he fraudulently entered satisfaction of the judgment. This depends on the verity of his evidence as to the nature of the assignment to *Olcott*; if it was as he states it, then, on the payment of the notes, he alone was entitled to acknowledge satisfaction.

Feeling myself constrained to yield the greater credit to *Wardell*, it follows, that the object of his assignment to *Olcott* was fulfilled by the payment of the notes; and from the principles I have before laid down, *Olcott's* interest in the judgment ceased, and those deriving title under him, being invested with no other or greater right than he had, can, neither on legal or equitable principles, pretend to a right emanating from one who had ceased to have any. I will only observe, that by the assignment to *Olcott*, he acquired an equitable interest, commensurate *with the object for which it was made. His transfer of the assignment vested his assignee with his equitable interest, and no more. The assignment of an assignment acquires no negotiable quality, and the last

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assignee cannot, it appears to me, be clothed with a greater title than the first assignor. On either, and both of these grounds, I am fully of opinion, the appellants are entitled to the decree of this court, for the money produced by the sale of *Eden's* real estate. It necessarily follows that the issue, to try whether *Eden* had notice of the assignment to *Olcott*, and what sums were paid by him to *Wardell*, and the periods of those payments, was irrelevant and immaterial.

I am, nevertheless, disposed to bestow some consideration on the order appealed from. After the first order for the trial of the feigned issue, and a verdict for the appellants, which affirmed the payments by *Eden*, and negatived the notice to him, of the assignment by *Olcott*, a second trial was ordered, on the ground that *Olcott* was a material witness, and, through the mistake or inattention of the respondents' counsel, had not been struck out of the bill. If his name's being in the bill did really incapacitate him as a witness, I think the respondents concluded by their *mistake or inattention*.

The rule, both at law and in equity, is to refuse a second trial, where the propriety of the verdict is not impeached, as against law or evidence, though there be material evidence for the party against whom the verdict has passed, which was not adduced; unless it be shown to have been discovered after the trial, or unless the verdict has been obtained by fraud or surprise. (1 *Ves. jun.* 134.) If mistake in practice, or inadvertence in attention, furnished reasons for a new trial, it would encourage litigation, and reward ignorance and carelessness, at the expense of the other party.

The materiality of *Olcott's* testimony was well known before the trial, because, in his answer, he alleges, that soon after the assignment, he gave notice to *Eden*. The respondents cannot pretend, that by fraud or surprise they were prevented from having his name struck out of the bill. I am inclined, however, to think, that, notwithstanding his name was in the bill, he was a competent witness. Most clearly, *Olcott* had no interest in the cause; his contingent right in the surplus of his estate he released to his assignees; no decree could possibly pass against him; but he might, it has been said, have possibly been punished in costs. From the time of Lord *Hardwicke*, courts of law have been liberal in the admission of witnesses; and where the interest is not immediate or certain, they admit the witness as competent, and suffer the objection of a remote, contingent, or possible interest, to go to his credit. On the score of authority, I think *Olcott* a good witness. The cases of *Cotton v. Lutterell*, of *Piddock and Brown*, and *Man and Ward*, (1 *Atk.* 451. 3 *P. Wms.* 289. 2 *Atk.* 228.) are strongly in favor of his admission.

Did the cause rest, therefore, on the propriety of a new trial, I should be for affirming the decree. The other points on

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which I have observed, render any investigation of the facts forming the feigned issue unnecessary and superfluous.

From a suggestion made by an honorable member of the court, I have taken the trouble to examine the bill and answer having, in forming of my opinion, presumed that the parties would present every fact in their respective cases most favorable for themselves. The bill, it is true, states all the circumstances attending the transaction, and particularly the various assignments of the judgment in *Wardell's* favor against *Eden*, and it concludes with a special prayer, that that judgment may not be deemed a *lien* beyond the balance due on it from *Eden* to *Wardell*. It also contains a general prayer for such relief as in equity and good conscience the party is entitled to. In the whole course of the very elaborate and ingenious arguments submitted by the respondents' counsel, no stress was placed on either of these points. It was *not pretended that the appellants had notice of the situation of *Wardell's* assignee, or that they knew, when they lent their money, that the bank was interested in the judgment. Most clearly there is no evidence to warrant such arguments. I do not think that we are called upon to be astute in finding out formal objections, which never occurred to the counsel, to deprive the party of a just right, or to turn them round; but since they have been stated, I will briefly proceed to discuss them. It by no means follows, that because the appellants, when they filed their bill, knew the situation of the bank, that they had that knowledge when they lent their money and took their judgment. Neither does their omission to state their ignorance of those facts at the time of the loan, justify a presumption of such knowledge, especially after the bank had, in their answer, charged them with collusion, with *Wardell* and *Eden*, to injure them, and to deprive them of their security, under *Wardell's* assignment, and have wholly failed to substantiate the charge. This allegation of collusion, made by the bank, was put in issue by the appellants' replication, and the *onus probandi* was thrown on the bank. If, therefore, it would have been more technical to have denied notice in the bill, substantially, that point has been at issue, and is found for the appellants. It may be true, that if *A.* contract in writing with *B.* for the purchase of land, and *C.* takes a conveyance subsequently, and a bill be filed against him for a specific performance, charging collusion with *B.*, *C.* must, in his answer, not only make out that he is a fair *bona fide* purchaser, for a valuable consideration, but without notice of *A.'s* interest. The distinction is manifest between a bill and answer. Every complainant has a right to a full answer to the facts charged; and when charged, and not denied, it may be deemed an admission of the facts. The complainant's bill is no evidence for him, and his omission to state a fact, cannot furnish evidence of the fact, especially when insisted on as a defence, and not established.

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*With respect to the prayer for a specific relief, it is to be observed, that probably the appellant's counsel, in drawing the bill, might have had full confidence in the fact of *Eden's* paying off the judgment, or nearly so, without notice, and he might, and probably did, suppose the *vacatur* entered by the Supreme Court conclusive on the appellants. It would be rigorous, when a party had proved himself entitled to the decree of a court, to say to him, "You ought to be relieved, but you have put your right on a false basis." Fortunately, for the justice of the case, this is not the law. "It is usual," says Mr. *Mitford*, in his excellent system of chancery proceedings, "to add to the prayer of the bill, a general prayer for that relief which the circumstances of the case may require, that if the plaintiff mistakes the relief to which he is entitled, the court may yet afford him that relief to which he has a right." Mr. *Hinde* (*Hinde's Practice*, p. 17.) confirms this, in nearly the same words. In the case of *Hollis v. Carr*, (2 *Mod.* 91.) the court decreed a relief under the general prayer, distinct from the special relief prayed. I conclude, therefore, that there exists no objections in this cause, which might entangle justice in the net of form.

Various judgments of this court establish the precedent, that, on appeals from chancery, and where the merits are fairly before the court, they will pronounce a final decree. This case falls within those precedents. It is, therefore, my opinion, that the appellants be decreed to receive the net proceeds of the sale of *Joseph Eden's* real estate, under the execution in favor of *Wardell*.

THOMPSON, J. Though the argument of the present appeal has embraced a great variety of questions, I shall not examine all of them, since, according to the view which I have taken of the subject, I think the substantial merits of the case confined to a narrow compass. In order justly to estimate the rights and claims of the parties, we must examine the situation in which they respectively stand, and the relief sought for, and which can be afforded, under the *pleadings before this court. Both parties claim to be judgment creditors of *Joseph Eden*. The judgment under which the respondents claim is oldest in point of time; but satisfaction thereof was entered on record, when the appellant's judgment was entered up. This satisfaction was, however, adjudged by the Supreme Court to have been fraudulently acknowledged, and was, of course, vacated. The respondents being assignees of the judgment under which they claim, one part of the appellants' allegation in their bill is payment by *Eden* to *Wardell*, the original plaintiff on record, without notice of assignment. After the *vacatur* of satisfaction, as before mentioned, the respondents took out execution, and were proceeding to enforce it. To stay the proceedings, the appellants filed their bill, and the relief particularly prayed

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for is, that the respondents may be restrained from further proceedings at law, upon the judgment assigned to them, or upon the execution issued thereon; and that an account may be taken of the moneys paid on the said judgment; and that the said judgment may be decreed to stand as security for such sum only as may be really and truly due thereon, by *Joseph Eden*; concluding with a general prayer for such other and further relief in the premises, as shall seem meet. A part of this particular relief prayed for, being to have the benefit of all payments made by *Eden* to *Wardell*, and that the judgment should stand as security for the balance, would seem, in some measure, implicitly to admit that the judgment, under which the respondents claim, is entitled to priority. But, according to the course of chancery proceedings, a party is not confined to the particular relief asked for in the bill, but under the general prayer is entitled to such relief as the circumstances of the case may require. The reason of inserting the general prayer is, that if the party mistake the relief to which he is entitled, the court may afford him that to which he has a right. The relief, however, must be agreeable to the case made by the bill, (*Mitford's Pleadings*, 38.) and the court will not, in all cases, permit a bill framed for one purpose to answer another, especially if the opposite party may be thereby surprised, or *prejudiced; neither of which has been pretended in the present case. I the more readily avail myself of the general prayer, in order to enter into the merits of the case made by the bill, because such has been the course pursued by the counsel on both sides, without claiming to be confined to the particular relief prayed for. But a part of the particular relief prayed for here, is, that the respondents may be restrained from further proceeding on the judgment assigned to them. Full relief, according to the existence of facts, at the time the bill was filed, would have been afforded the appellants, by decreeing a perpetual injunction. In the bill filed in the court below, no notice is taken of the 14,076 dollars and 54 cents, acknowledged by the respondents, in their answer, to have been received by them. This is to be accounted for only on the supposition, that it was received between the time of filing the bill and the coming in of the answer; which is rendered probable by recurring to dates. It is not stated in the answer when the money was received; but it appears, that the execution could not have been issued until after *April* term, 1801; and the bill was filed on the second of *June* following. If the respondents were not entitled to recover this money, under the judgment assigned to them, they must, in equity, be deemed to hold it as trustees for the appellants. Here, then, arises what I consider the material question in this case, namely, Which judgment shall be entitled to priority? Admitting the appellants to have been ignorant of the assignment of the first judgment, and ignorant of the fraudulent satisfaction entered

on record, at the time they loaned their money, and took their judgment, I cannot entertain much doubt that they must be considered as having the first legal *lien*. The satisfaction entered on record, must, as to all persons who stand in the situation of innocent purchasers for a valuable consideration, be deemed valid and effectual; and the restoration of the judgment, as it respects their rights, can only be considered as forming a *lien* from the time it was so restored. Unless such be the legal operation, it would lead to the greatest injustice, and render insecure and uncertain the *lien* of judgments on real property; *and in vain would resort be had to our public records, to ascertain encumbrances. There is nothing in the rule of the Supreme Court, ordering a *vacatur* of the entry of satisfaction, from which it can be inferred, that the court intended to express any opinion as to the effects such proceedings would have on the rights of third persons. This was, doubtless, intended to be left open to subsequent determination, as cases might arise, probably, not being apprized of any intermediate judgments between the entry of satisfaction, and the restoration of the judgment. It never could have been intended to conclude the rights of parties, without giving them an opportunity of being heard. If the appellants have a prior legal right, and the equity between the parties be equal, it is not denied, that, according to sound and well established principles, the legal right must be preferred. It appears to me, that not only the legal but equitable right is on the side of the appellants. They loaned their money expressly on the faith of the security arising from the *lien* created by their judgment, having taken the precaution first to examine the record, and ascertained that no prior judgment existed that would impair their security. The respondents took their assignment as collateral security for a debt, not created on the faith of any *lien* arising from the judgment. The assignee of a judgment usually requires, and takes from the assignor, covenants to secure himself against the latter's doing any act to invalidate the security: such appears to have been the case in the present instance. And if the covenant of the assignor be not sufficient, it is in the power of the assignee to require some other security, or he may refuse to take the assignment. No such opportunity to guard against loss is offered to those who are strangers to the assignment; their knowledge of parties interested in judgments must be derived from the record, unless actual notice be given by the assignee, or a knowledge of the assignment is brought home to the opposing claimant in some other way. Can it be doubted that if the assignors, from and through whom the respondents claim, were responsible persons, resort would and ought to be had to them for indemnity? I have *thus far examined this question, on the supposition that the appellants are to be viewed in the character of *bona fide* purchasers, without notice of the assignment of the judgment

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under which the respondents claim. It remains to be inquired whether the appellants, according to the case presented to the court, are entitled to such character. Because, if they had notice of the assignment, they ought, perhaps, to be considered as conniving at the fraudulent satisfaction, and their *lien*, on that account, be postponed.

It is not pretended that the appellants are chargeable with express notice from the assignees; nor can I see how they can be by implication. No negligence is imputable to them; there was no record of the assignment to which they could have resorted for information. Nothing is stated to have come to their knowledge, which ought to have put them on inquiry. It is true, they have not alleged in their bill a want of notice; and this, perhaps, may afford some grounds for an inference against them. I am inclined, however, to think that no such allegation was necessary. They certainly would not have been required, neither was it practicable, to prove a negative. Where the object of the bill is to set aside the legal estate, on some equitable grounds, it may be necessary to allege want of notice, because this is the very foundation upon which the claim to equitable relief is built. But in the present case, as I have endeavored to show, the appellants are in possession of the legal right, and we are to examine the claims of the respective parties, in the same manner as if the respondents had been complainants in the court below. But, admitting that a want of notice of the assignment ought to have been alleged in the bill, it appears to me this defect is cured by the subsequent pleadings and acts of the parties. The respondents, in their answer, allege that *Wardell*, combining with *Eden* and the appellants, to deprive them of their security under the judgment, acknowledged satisfaction of it, and caused the satisfaction to be entered on the record. This allegation is denied by the replication; the question of notice was thereby put in issue between the parties, the affirmative of which is on the part of the respondents, and which they are bound to prove, if they are to avail themselves of it for the purpose of avoiding the legal estate, or *lien*. It was not pretended on the argument, that, according to the case presented to the court, the appellants were chargeable with notice of the assignment. The controversy was put on totally distinct grounds, which I construe into a waiver of the objection, as it respects the pleadings.

If I am correct, then, in the propositions which I have endeavored to establish, that the appellants must be considered as in possession of the legal right, and that they are not chargeable with notice of the assignment of the judgment under which the respondents claim, then no issues were necessary. There was no contrariety of evidence on those questions. The equity was, at least, on the side of the appellants; and having the legal right with them, they were entitled to a de-

cree in their favor, restraining the respondents from all further proceedings on the judgment under which they claimed, and directing them to pay over the money which they, in their answer, acknowledged to have received; and which, according to the circumstances of the case, they must be considered, in equity, to hold as trustees for the appellants. Although the immediate object of the bill could not have been the recovery of this money; because, as I have endeavored to show, it had not been received by the respondents when the bill was filed; yet, if the bill partakes of a double aspect, and such a case is presented as entitles the appellants to relief, I see no good reason why it should not now be granted, without turning the parties round to litigate anew, and bring forward their claim in a different shape, especially, as no surprise or prejudice is alleged by the respondents to arise to them by adopting this course, it not being pretended that any new light, on this point, can be given. The verdict of the jury, one way or the other, upon the issues ordered to be tried, would not, according to my view of the case, alter the rights of the parties before this court. Those issues extend only to an inquiry respecting the notice which *Eden* had of the assignment of the judgment, *and to the payments which he had made thereon previous to receiving such notice, and not to any knowledge which the appellants had of such assignment. Without, therefore, examining any more of the points which have been raised in this case, and very elaborately argued, I am of opinion that the order, or decree, of the Court of Chancery ought to be reversed.

[LIVINGSTON, J., having been formerly concerned as counsel, gave no opinion.]

KENT, Ch. J. I shall be obliged to differ from my brethren who have preceded me. This I do with deference and reluctance, but under the pressure of superior duty to pursue and declare the conclusions of my own judgment.

The most important question which has been raised in this cause, is, whether the appellants are to be considered as having a priority to the respondents, in respect to the judgments against *Eden*. This pretension ought first to be examined and settled. If the appellants are entitled to a preference, all the other points in the cause become immaterial, for, as between two contending judgment creditors, he who has the prior judgment must be first paid.

The manner in which this question is brought before the court is a little singular, and deserves attention. The appellants filed their bill in the court below, on no other ground of complaint than that the respondents were proceeding, at law, to collect the amount of *Wardell's* judgment, after it had been once paid. It was their only grievance that the judgment was likely to be twice collected, and that, as *Eden* was insolvent,

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the judgment of the appellants must remain unsatisfied. The cause proceeded to a hearing, and an issue was awarded on the single question of payments by *Eden*, before notice of the assignment. In the awarding of this issue, the appellants acquiesced, and the point raised in this court was undoubtedly an after-thought, as it is not so much as once suggested in the bill, and as it formed no part of the litigation below. But, after contending so long, under the limited claim of *subsequent* judgment creditors, the appellants come with a suspicious countenance before us, at this late hour, and under the same bill, to claim the benefit of *prior* judgment creditors. In most cases, such conduct would justly be deemed a waiver, or abandonment of the latter claim; for, if the present pretension of the appellants be well founded, then all the examinations and trial below, about notice to *Eden*, and payments by him to *Wardell*, were idle and nugatory, and an abuse of the time of the court. If, however, the appellants be not absolutely concluded from setting up this new ground of title, yet their conduct forms a powerful reason why this court should listen to it with caution and distrust. So prominent a point in a cause could not have slumbered so long, without a diffidence in the facts that were requisite to maintain it. The proofs of their pretension to be *bona fide* judgment creditors, without notice, ought, at least, to be of the most positive kind, without any shadow of doubt or ambiguity.

The acknowledgment of satisfaction, by *Wardell*, was vacated by the Supreme Court, on the ground that, as *Wardell* had previously assigned over his right and interest in the judgment, his interference in cancelling that judgment, without the knowledge and consent of the assignee, was an act fraudulent and void. After he had parted with his interest in the judgment, he had no more power over it than if he had been a stranger to it; and his attempt to vacate it was a violation of right. The Supreme Court, however, never meant to decide on the claims of an intervening creditor, who had obtained a regular judgment in the interval between the time of the entry of the satisfaction, and the subsequent *vacatur* of it. Such a case was not then before the court; but such a case is now urged in the present cause, and, under the circumstances in which it is presented, it merits our most serious consideration, because it touches on some of the soundest and best settled principles in our equity system. If this intervening judgment creditor should come before us, without any knowledge, at the time, that the satisfaction had been granted by a man unauthorized to make it, he would, undoubtedly, have a very good claim not to be disturbed by the court. For, if a creditor *who takes a judgment, or mortgage, should previously inspect the records, and find all antecedent judgments and mortgages cancelled, and should have no knowledge how they came to be cancelled, beyond what the record speaks, a court of equity

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would, in that case, refuse any aid against him, notwithstanding it should afterwards appear that the prior judgment, or mortgage, had been fraudulently cancelled. (a) But I am warranted, by the uniform current of the chancery decisions, in saying, that in such a case the court would refuse to interfere between the two creditors, and would leave him, who had any legal advantage, to retain it. The court would not act against either, because the equity of the parties would be equal. A creditor who comes in with his *lien*, after all antecedent encumbrances appear to be satisfied, has, no doubt, a strong claim to our protection. But the prior creditor, whose judgment, or mortgage, has been cancelled fraudulently, and without his knowledge, has a claim equally strong and inviting. They are creditors equally innocent, and equally to be favored; and I am satisfied that the Court of Chancery could not, consistently with its established principles, help the one to the prejudice of the other. Its answer would be, that where the parties stand equal before us, he who has the advantage at law shall be left to enjoy it, or, according to the lively allusion of Sir *M. Hale*, the party that has been fortunate enough to seize a *plank in the shipwreck*, shall not have it torn from him by the court. If, therefore, the appellants did really stand before us as judgment creditors, without notice of *Wardell's* assignment, we should be obliged to dismiss them, without affording them, on that ground, any aid or assistance against the bank. (b) Allow them all that they *now* pretend to be, we could do no more than this, without introducing principles and precedents unknown to our jurisprudence. I have supposed that in case of no notice, the equity of the parties might stand equal. This ought not to be denied by the appellants. There is no doubt but that the bank took the assignment from *Roe*, for a full consideration, and to save themselves from a grievous loss, *and without knowledge of any antecedent transaction, calculated to defeat it. They cannot be deemed guilty of negligence, in not recording the assignment, because it was not an act required by law, to consummate their title. There was no office that was bound to record it. It is never done in practice, and there were, indeed, but four days between the assignment and the new judgment. It is idle, therefore, to impute any neglect to the respondents, in diminution of their equal equity. On the other hand, I forbear to dwell on the fact, that 12,000 dollars of the appellants' demand arose from notes and checks, and that we are left wholly without explanation, whether those notes and checks proceeded from the appellants themselves, or whether they were not notes and checks of *Eden*, which had been purchased up at a speculating discount in the market. If the latter was the case, then, indeed, I

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(a) See 6 *Vesey*, jun. 184, 185(b) See 9 *Vesey*, jun. 24.

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should agree that the equity of the parties was not equal, because the one side would be struggling to avoid a loss, whilst the other would be striving to gather in, and secure the harvest of his speculations.

I have hitherto considered the appellants as if they had come here in the character of *bona fide* purchasers, without notice, and even then, they could have no relief from us; all we could do would be to dismiss their bill, or to decide the cause on the grounds litigated in the court below. But the fact is, that the appellants do not come before us in that character. They are to be considered as acting *with notice* that *Wardell* had assigned over his interest in the judgment, at the time he acknowledged satisfaction. This inference appears to me to be the inevitable conclusion of law, from the silence of the appellants in their bill as to the fact of their want of notice. If a party will *claim* a benefit, resulting from the want of notice, and the truth of the fact is within his own knowledge, he shall be presumed to have had notice unless he denies it. *Qui tacet consentire videtur*. The appellants, from their own showing, prove the acknowledgment of satisfaction, by *Wardell*, to have been a nullity, and a fraud; for they state his, and the subsequent assignments of the judgment, but they omit to state when they first came to the knowledge of these assignments, and for aught that this court can know to the contrary, it may as well have been before, as after the date of their judgment. They content themselves with saying merely, that their money was loaned, after satisfaction had been entered, and upon a *supposition that nothing was due*. This supposition is perfectly consistent with a knowledge of the assignments, and may have proceeded from a credulous reliance on the assurances of *Wardell* and *Eden*. It is a rule in chancery, not to aid a *cestui que trust* against a purchaser from a trustee, if he be a purchaser for a valuable consideration, and without notice of the trust. (a) (2 *Fonb.* 151, 152. 3 *Bro.* 264. *Williams v. Lambe* 2 *Vesey*, jun. 454. *Jerrard v. Saunders*. 3 *Vesey*, jun. 222 *Strode v. Blackburne*.) But no instance is to be found in which such purchaser is protected, unless he aver himself to be a purchaser, without notice, of the trust. He is bound to state, affirmatively, in his plea, that he had no notice, and whether he claims the benefit of the purchase in the character of complainant or defendant, it can make no difference in the case. The general rule of pleading in chancery is, that whatever is essential to the rights of the plaintiffs, and is necessarily within his knowledge, must be alleged positively, and with precision. (*Mitford*, 40.) This rule is too reasonable and logical not to command the assent of every understanding. In the case of *Jerrard v. Saunders*, (2 *Vesey*, jun. 454.) the defendant pleaded a purchase for a valuable consideration, with-

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out notice; but as the plea did not deny the facts charged, from which notice was to be inferred, the plea was overruled, and he was called upon to answer the facts, which might raise a constructive notice; and Lord *Loughborough*, in that case, required, that the purchaser should fully, and in the most precise terms, deny every circumstance from whence notice could be inferred. If, then, the appellants knew, at the time of taking their judgment, that *Wardell* had assigned his judgment, and that he was but a nominal party to the record, they acted at their peril; and they were bound to have inquired of the *cestuy que *trust* whether he was knowing and consenting to that satisfaction. If they did not choose to make that inquiry, but were willing to rely upon the declarations of *Wardell* and *Eden*, they ought, justly, to bear the consequences of their supineness. We are not to help a party in setting out his title. It is incumbent on him to state a valid pretension. The appellants ask us to help a title which they challenge as superior, by reason of *Wardell's* fraud; but to raise any equity in their favor, they ought, at least, to purge themselves of any knowledge of that fraud. It would be a proceeding contrary to all rule and salutary precedent, for us to presume that the appellants acted without knowledge of *Wardell's* assignment, when they do not pretend to deny it in their bill, and when the truth of the allegation, that they had or had not notice, remained in their own breasts. This is, probably, the first instance ever heard of, that a person claiming to be a purchaser, without notice, came into a court of equity, *in the character of plaintiff*; and the reason that there has been no such case is the one already mentioned, that where the equity of the parties is equal, chancery will not interfere. I do not ask the appellants to do what they cannot do, prove a negative. They cannot prove no notice. But they can tell us, by their bill, in what character they claim relief. If they claim it as purchasers, without notice, let them say so; then they raise some equity on the face of their bill, and it would lay with the respondents to rebut it, and to prove affirmatively that they had notice. My proposition has, at least, the merit of plainness and simplicity. It is, that the court will never presume that a party's case is better than he states it; and if he does not state that he is a purchaser, without notice, we will not presume him to be one.

But the bill furnishes still more positive and conclusive proof on the subject. The appellants state, as their grievance, that the bank had levied an execution against *Eden*, when nothing was due from *Eden* thereon, and that thereby the appellants were deprived of their security. They then called upon the bank to discover whether *Eden* had not fully paid the judgment to *Wardell*, and they pray, "*that the judgment *of the bank may be decreed to stand as a security for such sum only as may appear to be really and truly due thereon by Eden.*" The

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bill, therefore, contains a very explicit acknowledgment, that the judgment of the bank ought to have preference for the balance honestly and truly due thereon; and to give the appellants a priority in their judgment is to force upon them a right which they do not ask for, or pretend to. And although, under the general prayer in a bill for relief, (a) you may give a party greater, or different relief than that specifically prayed for; yet, when such specific relief necessarily implies the non-existence or relinquishment of a claim, it would be altogether unprecedented to depart from the special relief, and under the general words of form in the bill, to enforce such claim.

I conclude, therefore, 1st. That if the appellants were *bona fide* judgment creditors, without notice of *Wardell's* assignment, they would have no more equity than the respondents; and this court would not interfere with their claims at law; 2d. That the appellants are not to be deemed such creditors, because they do not state themselves to be such in their bill, and because the whole complaint and prayer in the bill are founded on the non-existence or relinquishment of such claim. The parties stand exactly as they would have stood if *Wardell* had never made his fraudulent acknowledgment of satisfaction, and the appellants, as subsequent judgment creditors, have an undoubted right to establish, by proof, the payment of the first judgment. If *Eden* paid *Wardell* before notice of the assignment, the payment was valid, and his estate ought not to be charged with a second payment. The real merits of the cause will, therefore, turn upon this single point, what payments, and to what extent, were made by *Eden* to *Wardell*, previous to notice. But before we come to consider this part of the cause, it will be requisite to take notice of another objection which has been raised by the appellants' counsel to any claim of the bank, as derived from the assignment.

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It is urged, that the assignment of the judgment of *Olcott* was not absolute, but was made and intended to be merely ^{as} a collateral security for a special purpose, which purpose was afterwards accomplished; that the consideration for that assignment was only 25,500 dollars, and that shortly after, *Olcott* received of *Wardell* three promissory notes for that purpose, which he transferred to different persons, and that they have since been paid; that by the payment of the notes, the right of *Olcott* to hold the judgment became extinguished, and the interest in the judgment reverted back to *Wardell*; that *Olcott* could not transfer any greater interest in the judgment than what he himself held, and that every assignee of a *chose in action* takes it subject to all equity; and that, for these reasons, the bank has no interest in the judgment, all the interest which remained in it having reverted to *Wardell*.

This is the substance of the argument on the part of the

(a) See *Hern v. Mill*, 13 Vesey, jan. 113. Relief under a general prayer must be consistent with the case made by the bill.

appellants, and, to my apprehension, it is easy to perceive and detect its fallacy.

In the first place, it is to be observed that the assignment of the judgment is, upon the face of it, absolute and not conditional. It is by a long and solemn instrument under seal, drawn with technical skill, declaring the consideration to be 50,000 dollars, and fortified with every provision and covenant, which are requisite to show that *Wardell* parted absolutely with all his interest in the judgment, and that he had received a full consideration. Proof that the assignment was intended by the parties to be different from what is expressed, is altogether inadmissible. It is a sound rule of evidence, that you cannot alter, or substantially vary, the effect of a written contract by parol proof. This excellent rule is intended to guard against fraud and perjuries, and it cannot be too steadily supported by courts of justice. *Expressum facit cessare tacitum*; —*vox emissa volat*; —*littera scripta manet*, are law axioms in support of the rule; and law axioms are nothing more than the conclusions of common sense, which have been formed and approved by the wisdom of ages. This rule prevails equally in a court of equity and a court of law; for, generally speaking, the rules of evidence are the same in both courts. If the words of a contract be intelligible, says Lord Chancellor *Thurlow*, (*Shelburne v. Inchiquin*, 1 Bro. 341.) there is no instance where parol proof has been admitted to give them a different sense. Where a deed is in writing, he observes, in another place, (*Jonham v. Child*, 1 Bro. 93.) it will admit of no contract which is not part of the deed. You can introduce nothing on parol proof that adds to or deducts from, the writing. If, however, an agreement is, by fraud or mistake, made to speak a different language from what was intended, then, in those cases, parol proof is admissible to show the fraud or mistake. These are cases excepted from the general rule. But the allegation of fraud or mistake must be made in the bill, before evidence to those points can be received. (*Cripps v. Jee*, 4 Bro. 472.) In the present case, there is no allegation or pretence, that the assignment was made absolute, by means of fraud or mistake; and on no other ground was parol proof admissible to alter it. If it were to be admitted that the assignment might be varied by parol proof, yet the proof offered in the present case was not of a competent nature. The witnesses to this point are *Olcott* and *Wardell*. *Olcott*, the original assignee, admits in his answer, that the assignment was given for a collateral security. That confession, however, is no evidence against the respondents, who were co-defendants, because they had no opportunity to cross-examine him. This court so decided two years ago, in the case of *Grant v. The Bank of the United States*. The testimony of *Wardell*, to this point, was wholly improper; for he ought not to be heard in opposition to his own solemn act and deed. The Supreme

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Court, in July term, 1803, in the case of *Winton v. Saidla*, did recognize and adopt the *English* decision in *Walton v. Shelly*, (1 Term Rep. 296.) that no man should be permitted, even as a witness, to invalidate a negotiable paper which he had signed. The case there arose on a promissory note, but, from the reasoning of some of the judges, I understand them as adopting the general principle of the *English* case, that no person was a competent witness to impeach a deed or security which he had given, and that he was estopped, as well in the character of witness as that of party, by *his own act and deed. This rule, that a written contract shall not be contradicted by parol proof, without showing an original fraud or mistake, at the time, applies as well where the contract is introduced in a controversy between third persons, as where the litigation is between the original parties to the contract. It was so understood by the Court of K. B., in the case of *The King v. The Inhabitants of Laindon*. (8 Term Rep. 379.) It is reasonable that this should be the case, in order to protect the rights of strangers who may have become interested in the contract, and to prevent fraudulent collusions between the original contracting parties, in setting up secret meanings, to impair or destroy their own solemn engagements. It appears to me, therefore, that we must consider the assignment from *Wardell* to *Olcott* as an absolute, unconditional assignment, and that we are bound to judge of the nature of the assignment from the instrument itself, and not from the suggestions of *Olcott*, in his answer, or of *Wardell*, in his deposition.

But even admitting that the operation of the assignment was impeachable, and that the witnesses offered for that purpose were competent, and made out the fact that *Olcott* took the assignment as a collateral security merely, and for a much less consideration than it states, still there remains another objection to surmount, and that is, that in the hands of a subsequent assignee, without notice of any private agreement *dehors* the instrument, the assignment must be regarded what it purports to be, absolute and unconditional. This is a rule of a court of equity, perfectly well settled. When it is said that an assignee of a *chose in action* takes it subject to all equity, it is meant only that the original debtor can make the same defence against the assignee that he could against the assignor; the rule has never received any other application. A purchaser without notice, from a purchaser with notice of a trust, is not considered in equity as bound by that trust. (2 Vern. 384. 2 Fonb. 153.) If one affected with notice, says Lord Chancellor *Hardwicke*, in *the case of *Mertins v. Jolliffe*, (Amb. 313.) conveys to one without notice, the assignee, in case he has the legal estate, shall protect himself against prior encumbrances. In the present case, the bill does not charge the bank with any notice of a conditional assignment, and if it did, the answer of the bank denies any; for they declare, that

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the original assignment to *Olcott* was for the full consideration of 50,000 dollars, expressed in the deed, and that they were wholly ignorant that it was made for any other consideration, or for any other particular purpose. They further state, that the assignment from *Roe* to them was for the like consideration. Indeed, it is not suggested, in any pleading, proof, or argument in the cause, that the bank took the assignment from *Roe*, with any knowledge of the parol agreement between *Wardell* and *Olcott*, and the chief objection to *Olcott's* testimony is on the ground that he did not disclose to *Roe* the private understanding between him and *Wardell*. In every view, therefore, in which the subject presents itself, the state of the accounts between *Wardell* and *Olcott*, and the secret conditions which they attached to the assignment, are perfectly irrelevant to the present controversy. Those accounts and agreements must be left to be settled between *Wardell* and *Olcott*. They ought not to obtrude themselves upon our present attention.

I have thus faithfully endeavored to clear this cause of all the preliminary difficulties which have been thrown in its way by the ingenuity of counsel; and though I always feel a well grounded diffidence in my own judgment, when I am not supported by my brethren; yet the positions I have taken appear to my mind to be so hemmed in by authority, that, step which way we will, we cannot escape from their conclusions, without trampling upon precedents which we ought, perhaps, to revere.

I shall very briefly examine the remaining questions in the cause.

*The real question is that which I have already stated, viz. To what extent has the judgment which the bank possess, been legally paid? Upon this question there is contradictory proof in the case, and it was for the information of the court below upon this matter of fact that the issue was awarded. The chancellor had an undoubted right to have decided this question upon the proofs before him, without calling in the aid of a jury. But where the question is doubtful, and especially where it turns upon the credit of opposite witnesses, it is the usual and prudent course of the court to refer it to a jury, which is the common law tribunal for the trial of facts. The payment of this judgment, if made at all, was made to *Wardell*; for it is agreed that no payments were made to any of the assignees of the judgment; and it is a principle equally agreed to, that all payments made to *Eden* by *Wardell*, before *Eden* had notice of the assignment, were valid, and that all payments by *Eden* after notice, were made by him in his own wrong, and are not available against the assignees. The question then is, When was notice of the assignment given to *Eden*? On the one hand, *Eden* testifies that he had no notice till the 9th of *October*, and on the other hand, *Olcott* says he gave notice to *Eden* shortly after the assignment, which was made

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on the 17th of July. This testimony of *Olcott* is objected to but as against the appellants, who called for that answer, it may be read in chancery; it is certainly not more objectionable than the testimony of *Eden*, who had never duly released his interest in the surplus of his estate. But putting *Olcott's* answer entirely out of view, there was the testimony of *Wilkins*, who seems to be admitted as a disinterested and very credible witness, and he swears that *Eden* confessed to him that he knew of the assignment at the time it was made. This stood the testimony before the chancellor; and if the balance of it does not incline in favor of the bank, it must, at least, be deemed to be doubtful, and to form a proper case for a jury. It was, therefore, *the exercise of a sound discretion, in the court below, to award an issue.

The issue was tried, and the jury found that *Eden* did not receive notice till the 9th of October, and the judge certifies, in the usual form, that he was satisfied with the verdict. This verdict would, then, probably, have been acquiesced in, and have put an end to the cause, if the judge, upon the trial, had not excluded *Olcott*, who was a witness on the part of the bank. On this ground; a new trial was moved for, and granted. The cause is, then, at last, narrowed down to this single point, Was *Olcott* a competent witness? If he was, it will scarcely be pretended but that a new trial was proper; for a verdict founded upon the exclusion of legal testimony, never can give satisfaction to the conscience of any court. It is impossible for us to say what weight the jury might have given to the testimony of *Olcott*, and whether a critical attention to it might not have turned the scale. The case of *Stace v. Mabbot* (2 Vesey, 553.) is in point. Lord Chancellor *Hardwicke* granted a new trial, and observed, "that the judge has declared he is well satisfied with the verdict; and if nothing appeared to me but what appeared to him thereon, I think I should have been of the same opinion. My opinion, therefore, in granting a new trial, is grounded upon new evidence, which was not before the jury, and which is material.

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The objections to the competency of *Olcott* are, 1. That his name stood as defendant in chancery; 2. That he had been guilty of fraud in assigning to *Roe*, absolutely, a judgment which he took only as a collateral security, and that he might, in consequence thereof, be liable to costs in the suit in chancery. The reason assigned by the chancellor against the first objection appears to me to be very forcible. He considered it as an objection to a point of form merely, and that to conclude the party by it would be rigid. If a co-defendant disclaim, or have no interest in the event of the cause, he may, by an order of the Court *of Chancery, be examined as a witness, though his name be not struck out of the bill. (2 Ch. Cas. 214.) It is a motion of course, says Lord *Hardwicke*, (*Man v. Ward*, 2 Atk. 228.) to examine such a defendant. In another case 444

(1 *Vern.* 230.) it is said that a co-party, who has no interest, or disclaims it, is a good witness, and it makes no mention about the order. I believe, however, it is the practice of the court to make such an order, and yet, as it is a matter of form, and granted of course, it would be most unreasonable to deprive a party for ever of the benefit of testimony, from so trifling an inattention. I am yet to believe, that the judge might not even have dispensed with the order, and I am sure that the appellants ought not to receive the countenance of this court, in availing themselves of so frivolous an objection.

The second objection is of a more plausible kind, but, I think, equally destitute of any solid foundation. It is said, that *Olcott* may possibly be made chargeable with costs, for his fraud, and that, therefore, he has an interest in the cause. If this position be granted, it will not disqualify him; for, notwithstanding the strictness of some old cases, the rule is now well settled, that it must be a present, vested or certain interest, and not a remote, possible, or contingent interest, that will disqualify a witness. (*Peake's Ev.* 93. 1 *Term Rep.* 163.) On this ground, it has been held (4 *Term Rep.* 17.) that a parishioner, who was liable to be rated in the poor rate, but was not, in fact, rated at the time, was a competent witness to prove the ratability of others. Of late, the inclination of the courts has been to confine the question of interest within strict and precise boundaries, and to let objections go more to the credit than to the competency of witnesses. The case cited by the appellants was that of *Barret v. Gore & Umfreville*, (4 *Atk.* 401.) where the court is made to say, that if one defendant, who is offered as a witness for another, may, by possibility only, *be liable for costs, he shall be excluded. But this is directly contrary to the more recent and rational principle which I have mentioned; and it is impossible that it can be correct to the extent there laid down. It can be shown, by several cases, that unless there can be a decree against a party, he cannot be made liable for costs. In *Piddock v. Brown*, (3 *P. Wms.* 288.) which was a bill to impeach some bonds, as obtained by fraud, one of the co-defendants was offered as a witness, and was objected to, on the ground, that though there could be no decree against him, yet, his answer being falsified in many parts, he might be liable for perjury; but Lord Chancellor *Talbot* laid down this general rule, that if a plaintiff has no equity, or, in other words, no ground for a decree against a defendant, he is a good witness; else it would be in the power of a plaintiff to take off all the defendant's witnesses, by naming them as defendants in the action. Again, in the case of *Cotton v. Lutterell*, (1 *Atk.* 451. 2 *Ves.* 223.) the bill was filed against *Lutterell* and Lady *Cheshire*, to be relieved against a settlement said to be obtained by fraud, and also to have a conveyance and account of profits, and Lady *Cheshire* was equally charged with the fraud. But her deposition was allowed to be

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read, and the chancellor said that it was necessary to make her a defendant, for the purpose of discovery; but she could not be brought to a hearing, as she was no ways concerned in interest, in the event of the suit, and, consequently, no decree could be made against her. And if there be no decree against her, he observes, how is it possible that costs could be given against her? The charge of fraud against her went, therefore, only to her credit, and not to her competency. It would be difficult to find a case more applicable to the present, or where the reasoning is more conclusive. In *Barrett v. Gore*, the bill stated a breach of trust in one defendant, and prayed a specific performance against the other; and it appeared that the defendant, who was offered as a witness for the other, had *grossly misbehaved in the trust, and a decree might, perhaps, be had against him by compelling him to reassume his trust. But let that solitary and loosely reported case read as it may, it appears, that subsequent to all these cases, (2 *Ves.* 284.) the decision in *Cotton v. Lutterell* was quoted and confirmed, and the court held, that where nothing could be prayed against a co-defendant, he should be dismissed without costs; for that a person should not be brought before the court merely to pray costs against him. I think I have, therefore, abundantly proved, that as *Olcott* had no concern or interest in the present cause; that, as he was not brought to a hearing, and no decree was prayed, or could be had against him, he was not liable to be amerced in costs, and was, consequently, a competent witness for the bank, and ought to have been received at the trial.

There was an objection, also, made to the form of the order for a new trial, that it did not state that the chancellor had decided that *Olcott* was to be deemed a competent witness, notwithstanding both objections. This is a criticism almost too idle to deserve notice, and has no foundation in fact. The order does state that *Olcott* shall be admitted to be sworn as a witness, *notwithstanding his being a party in the cause*, which reaches equally to both objections, for both arise from his being a party.

I am, accordingly, upon the whole view of the case, of opinion, that the interlocutory order below ought to be affirmed, and the cause remanded.

WOODWORTH, Attorney General. I concur in the opinions which have been delivered, for reversing the order, and that judgment be given in favor of the appellants.

NICHOLAS, Senator. I concur in the opinion delivered by his honor the chief justice.

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The majority of the court having declared their opinions in favor of a reversal; it was thereupon ORDERED, DECREED and ADJUDGED, that the order and decree complained of *be reversed; and that the appellants are entitled to receive the net
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proceeds of the sale of *Joseph Eden's* estate, on the *fieri facias*, in favor of *John Wardell*, against *Joseph Eden*, and the costs in the Court of Chancery; and that the proceedings be remitted to that court, to be carried into execution, with directions, also, to the chancellor, to decide, whether, under the facts and circumstances of the case, the appellants are entitled to interest on the sum above decreed to the appellants.

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Judgment of reversal.

WILLIAM GREEN, who is impleaded with AYLMAR JOHNSON and others, *appellant*,
against
EPHRAIM HART, *respondent*.

AYLMAR JOHNSON, on the 2d September, 1796, being justly indebted to *William Green*, in the sum of 1,551 dollars and 64 cents, gave him a promissory note for that sum, payable to him, or his order, at the *Bank of New-York*, on the 1st of May, 1798. To secure the payment of this note, *Jonas Platt*, who was a trustee of *Johnson*, executed a mortgage of two lots of land in *Corley's Manor*, which was duly registered.

In October, 1796, *Green* endorsed the note to the respondent, and delivered it to him, with the mortgage, which he holds. The respondent filed his bill against the appellant and others, stating the above facts, and that he paid a valuable consideration for the note and mortgage, and that, by non-payment of the money, he was seised of the mortgaged premises; requiring an answer to every part of the bill, and praying that the money might be paid, or the premises sold in the usual manner.

The respondent, on the 3d of March, 1798, gave a receipt *to *Green*, acknowledging that he received the note of *Johnson*, as collateral security for the payment of *Green's* note to him for 1,491 dollars and 11 cents, payable the 3d of May, 1798, and stating, that the note of *Johnson* was secured by a mortgage which was "not assigned."

Johnson, in his answer, insisted that the mortgage had not been assigned to *Green*, who stated, that the sum really lent to him by the respondent was only 1,035 dollars; the residue of the note being for usurious interest. There was no satisfactory evidence of the usury; and the chancellor decreed a sale of the mortgaged premises, and an account to be taken of what was due on *Johnson's* note, and directed the proceeds to be applied to the payment of what was due, and the costs. From this decree *Green* appealed to this court.

Where the complainant in his bill inquired as to the consideration of a note, but asked nothing as to usury, and the defendant in his answer alleged usury, the endorsement of the note by the complainant was held *prima facie* evidence of a full and adequate consideration, and the answer of the defendant not to be evidence of the usury, which ought to be proved. Where

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a mortgage was given to secure a note payable to order, and the holder endorsed the note over, and at the same time delivered to the endorsee the mortgage, but made no assignment of it in writing, it was held that the transfer of the note being in writing, the mere delivery of the mortgage

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security was a sufficient assignment. The debt is the principal, and the security the incident. The assignment of the principal draws after it the incident. (a)

(a) *Pattison v. Hull et al.* 9 Cow. Rep. 747. *Jackson v. Blodget*, 5 Cow. Rep. 202.

The reasons for the decree were assigned by

THE CHANCELLOR. Since I have had the honor of presiding in the Court of Chancery, I have uniformly made it my practice, on every occasion which involved the least doubt, to reduce the opinions I expressed to writing. Hence, on every appeal from any decree pronounced by me, in that court, I have, in assigning my reasons for it, strictly confined myself to the precise terms in which my opinion was conceived at the time of delivering it.

I regret, that either an impression that the decretal order appealed from in this case was consonant to the established principles of the court, or my having parted with, or mislaid the paper containing my reasoning on the subject, will prevent me from following my usual course.

As the circumstances attending the argument have left very indistinct traces of it in my mind, and as I have not even a note respecting the manner in which I disposed of the points presented for my determination, I must necessarily substitute my present view of the subject for that on which the decree appealed from was founded.

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It cannot be of much use to travel further into the *cause than the points on which the *appellant* relies for the reversal of the decretal order; and as the solicitude which a sense of duty cannot fail to excite is now devolved upon this court solely, the reasons which occur to me in support of the order will be stated with the utmost brevity.

The disparity between the amount of the sum, to secure which the note was transferred, and the sum due on it, is a proper subject for the examination and adjustment of the master; upon the coming in of whose report, it would have been competent for either party to apply for a modification of the judicial decree, so as to consist with the rights of the several parties in interest.

The usury is disclosed in the appellant's answer. The existence of the mortgage and the note is admitted. The allegation of usury is merely in avoidance in its present complexion; for though in answer to the complainant's allegation of a pre-existing *bona fide* debt, it might have effect, if the evidence of the existence of the debt depended upon parol only; yet, I think, it is not of itself, and unsupported by other proof, available to defeat a deliberate promise, *in writing*, acknowledging a receipt of the value, and engaging to pay in consequence of it.

The inceptive steps of strictly fair and legal loans are, not unfrequently, from the nature of the transaction, secret and confidential, and the knowledge of them confined to the parties interested; and if the simple averment of the borrower, though verified by his oath, possessing the force attached to it as an extorted disclosure from a deponent, can be admitted to destroy the effect of securities deliberately formed and clothed

with the necessary legal formalities, the suppression of the exaction of usurious interest by those means must unavoidably tend to promote the greater evils of fraud and perjury.

The circumstances to be collected from the testimony have no necessary connection with the transfer; nor does it appear to me that they are so corroborated by the appellant's answer as to render it doubtful which ought to preponderate. *If that were not the case, it could not be a proper subject for an issue.

As to the second point, whether the respondent acquired any right to the mortgage in question by the transfer of the note.

The note given to the appellant by *Aylmar Johnson*, was coeval, and part of the same transaction, with the mortgage in question, and the only reason why the agency of *Jonas Platt* was at all connected with it, appeared to have been, because he held the mortgaged lands, which were intended as collateral security for the payment of the debt due from *Johnson*, as his trustee. *Johnson*, therefore, in every equitable point of view, was both the maker of the note and mortgagor, as the mortgage was executed by his direction or procurement, by his trustee, who has disclaimed all other interest than such as he holds as trustee, and respecting whose interest the parties do not differ.

The endorsement of the note by the appellant to the respondent was accompanied by the delivery of the mortgage. If the note was satisfied, it involved the satisfaction of the mortgage, for the *existence* of the mortgage, by express reference, depended upon that of the note. In its essence, and by act and operation of law, it was parcel of the same contract, executed at the same time, directed to the same object, and to be satisfied by the same means.

The doctrine laid down by Lord *Mansfield*, in the case of *Martin*, ex dem. *Weston*, v. *Mowlin*, (2 Burr. 969.) which was cited in argument before me, applies to this point with much force.

The question in that case arose on a bill between the representatives of the real and the representatives of the personal estate of the testator.

In defining the species of property of a mortgagor, Lord *Mansfield* observed: "A mortgage is a charge upon the land, and whatever will give the money will carry the estate in the land *along with it*, to every purpose. The estate in the land *is the same* thing as the money due upon it. It will be liable to debts; it will go to executors; it will pass by a *will not made and executed with the solemnities required by the statute of frauds. *The assignment of the debt*, or forgiving it, will draw the land after it, as a consequence; nay, it would do it, though the debt were only forgiven by parol; for the right of the land would follow, notwithstanding the statute of frauds."

The receipt of *Ephraim Hart* designates the mortgage as delivered, but *not assigned*. This, it appears to me, was merely descriptive of its situation at the time of its delivery.

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It had no formal assignment; but if it was intended not to be assigned, its delivery to the respondent is inexplicable, unless the slight ligament connecting the note with the mortgage is the reason, as alleged by the appellant. But that circumstance would appear to intimate that the parties intended they should remain inseparable.

I think, however, that the transfer of the note, and the delivery of the mortgage, are decisive on this point, and that the respondent took the latter as a legal incident of the transfer of the debt.

Pendleton, for the appellant. 1. The respondent did not, in his bill, allege a debt due to him from the appellant, though the note of *Johnson* was admitted to be a mere collateral security. The respondent charged that he paid a full consideration for the note. This is denied by the appellant; the debt, therefore, for which the security was given, ought to have been proved. Now, there is no proof of the original debt, nor even of the existence of the note from *Green* to *Hart*, unless the chancellor considered the receipt given by the latter as evidence of an existing debt. Admitting, for a moment, that the delivery of the mortgage was equivalent to an assignment of it, the decree should have directed an account to be taken of what was due on *Green's* note to *Hart*, and the mortgaged premises to be applied to that. Where the mortgagor denies the amount alleged to be due, the court will always direct an inquiry to ascertain the real sum.† The answer put the fact of consideration alleged at issue, and it ought to have been inquired into. If the mere production of papers be considered as conclusive evidence of the *amount due, it would be unjust in principle, and pernicious in practice; for there may have been payments made which do not appear on the papers. Again, the decree is erroneous, as it orders the whole sum to be paid, when it is admitted that 60 or 70 dollars, at least, are due to *Green*.

2. Wherever the fact of usury is brought before the court, equity will lay hold of it, and relieve, by inquiring into the amount of principal and interest really due, and decreeing the security to stand for that amount.‡

By the statute of this state against usury,§ all securities for the payment of usurious loans are declared void, and the party may recover back what he has paid beyond the legal interest. It would be useless and absurd to decree the payment of a usurious sum, when the party might immediately bring his action to recover it back.|| A court of equity ought to prevent a multiplicity of suits. It would have been more equitable, therefore, to have referred the whole matter to the master to have ascertained what was really due, exclusive of the usurious interest. Why allow a circuitry of action, when the whole matter may be fully settled in one suit?

† *Hardy v. Reeves, 4 Vesey*, jun. 466. *5 Vesey*, jun. 432.

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‡ *Henckle v. Roy, Exchange Assurance Com.* 1 *Vesey*, 319, 320. *Scott v. Nesbitt*, 2 *Brown's C.* 649.

§ *Laws of N.Y.* 67. s. 1, 2.

|| *Moore v. Batten*, *Amb.* 371.

3. But, admitting the original debt to have existed, was the mortgage *so assigned* to *Hart* as to give him a *lien* on the mortgaged premises for that debt? The act for the prevention of frauds,† declares, “that no leases, estates, or interests, whether of freehold, or term of years, or any uncertain interest, of, in, to, or out of any messuages, manors, lands, tenements or hereditaments, shall be *assigned*, granted, or surrendered, unless it be by deed, or note in writing signed by the party assigning,” &c.

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It is true, that some late decisions in the *English* courts have, in a great measure, rendered this provision, which is taken from the *English* statute, almost nugatory. They have determined that where the debtor delivers to the creditor the *title-deeds* of a real estate, with the intent that the lands shall be a pledge or security for the debt, it *shall be considered as an equitable mortgage, without any assignment or written agreement for that purpose.‡ And it may be said that it has been decided, that by an assignment of the debt, its securities also are transferred. It is true, there is a *dictum* of Lord *Mansfield's* to that effect,§ but it is against the spirit and intent of the statute of frauds.

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‡ 4 *Vesey, jun.*
24. *Moore* v
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A mortgage is an *interest* in lands, and is assignable as such. A mortgagee may bring ejectment. His interest, however, cannot be assigned without writing. If the debt and security be distinct, the assignment of the one is not a transfer of the other. The receipt given by the *respondent* expressly negatives the idea of the mortgage being assigned; yet the chancellor decreed that the note and mortgage were *collectively* assigned. It could not be an implied assignment, for the words negative an implied, as well as an express assignment. A deposit of deeds is no more than a pawn or pledge, to remain until redeemed within a certain time. Deeds are personal chattels, and a pledge or pawn is a deposit of personal chattels or effects.||

§ 2 *Burr. 974*† 2 *Vesey, jun.*
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Hoffman and *Harrison*, for the respondent. 1. It is said that there is no debt or consideration in this case. The note imports, on the face of it, a consideration, and it remained with the appellant to show it to be bad or corrupt. From the manner in which the counsel on the other side have argued, it would seem as if *usury* had been actually proved. There was only a mere allegation of usury, which was denied by the replication, and being put at issue, it was incumbent on the *appellant* to prove it. The mere suggestion of usury is not sufficient to entitle the party to the interposition of the Court of Chancery. In all the cases cited, the usury was proved, and, however odious it may be in the eye of the law, it must, like every other ground of defence, be proved. It is not an offence at common law, but created by statute, and if relied on in bar, or avoidance of a demand, ought to be strictly proved.

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*That the appellant in his answer swears there was usury, is not proof of the fact. He was made a party merely because the legal estate was in him. He was not a witness. He admits the two notes, and that they were unpaid. He was not asked about usury; the information was voluntary on his part. In the case of *Bush v. Livingston and Townsend*, adjudged in this court, at the last session, it was decided, that where the original transaction was *bona fide*, no subsequent transaction or agreement would render it usurious; nor was the answer of the defendant in that cause, alleging usury, considered as evidence. Supposing, therefore, for the sake of argument, that the note from *Green* to *Hart* had been usurious, it cannot impair the note and security given to *Johnson*. If *Green* wished for relief on that note, he ought to have filed his bill, offering to pay what was really due, and praying to be relieved from the residue. The respondent, as assignee of the note and mortgage, may receive the whole amount. If any be due from him to the appellant, it remains to be proved, and the respondent will be accountable, as trustee, for the surplus. The debt was fully proved, and there was no evidence of usury. To refer, therefore, the cause to the master on that point, or to direct an issue, would create useless delay. As to any surplus, it is in the power of the chancellor to distribute the fund between the parties according to equity.

2. The appellant complains that there was no assignment of the mortgage to the respondent. This objection would come with more propriety from the mortgagor. If the note be paid, the mortgage will be discharged; but should he pay the appellant on the mortgage, he would remain liable on the note. There can be no just motive for separating them. The respondent has a right to elect his remedy, and has resorted to the land. The mortgage can be of no use to any other person. The debt is the principal; the mortgage is the accessory. *Omne principale trahit ad se accessorium*. In the case of *Martin*, ex dem. *Werton*, v. **Mowlin*,† Lord *Mansfield* observed, that the assignment of the debt would draw after it the land, as a consequence. The dictum of so great a lawyer deserves consideration. But it is a principle which has been adopted and acted upon ever since, and is founded in solid reason. *Powell*‡ considers the debt as the principal, and the land as the incident, and the delivery of the mortgage deed, or security, is considered as an equitable mortgage or assignment. The language of the statute of frauds is, *unless the same be in writing, or unless it pass by operation of law*. If the debt draws with it the security, it passes by the operation of law. A *resulting trust*, arising by operation of law, is not within the statute. Here the assignment of the debt was in writing, so that there is no danger of fraud and perjury, to prevent which, that statute was made. Courts of equity consider a deposit of the *title-deeds* of an estate to secure a debt

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† 2 Burr. 979.Mortgages,
4th ed. 1115.

without any writing, as an equitable mortgage.† Our act is similar to the *English* statute, and the decisions of the *English* courts are applicable here. Why did *Green* deliver the mortgage, if he did not mean to transfer it as a security? In his answer, he says, it was attached by a string to the note, and delivered by *accident*. This reason is too trifling to be seriously admitted. It was impossible that he could have so delivered it by *accident*. The string which attached the mortgage to the note was a gordian knot, which he had neither the ability to untie, nor the heroism to cut: a court of equity will not separate them, for it would be worse than useless; it would be mischievous, to allow of different assignments of the debt and security. As to the words in the receipt, they were merely descriptive, that is, that no formal written assignment had been executed. They can have no effect, when it is shown that no such assignment was necessary. The grounds of appeal, in this case, are, in truth, so frivolous, that the court ought to inflict exemplary costs on the appellant, to prevent the abuse of appeals for the mere purpose of delay.

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Pendleton, in reply. The statute of frauds, in excepting transfers by *operation of law*, relates only to *resulting trusts*, *and does not apply to direct transfers. A *parol* agreement for the assignment of a mortgage is within the statute. The endorsement of the note did not transfer the mortgage by operation of law. If considered as an implied trust, yet, no trust can be created without writing, except such as arises by the operation of law. The decision of the *English* courts, as to the deposit of title-deeds, being since our revolution, are not authorities in this court. The cause must be here decided on principle.

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Where a party alleges a fact, and calls on the defendant to answer it, the answer is evidence, though not as to any collateral matter, suggested by way of defence. Here the bill required the defendant to answer to every part, as if particularly interrogated. The defendant is asked, Did you receive a full and valuable consideration for the note? and he answers that he did not, and states how much was actually paid. Here he is made a witness to that point; for the question of *usury* is necessarily involved in the inquiry as to the consideration. Why drive the appellant to a cross bill, when the whole matter might be investigated and settled, by an order of reference to a master, who would ascertain the balance really and *bona fide* due to the respondent? The order of reference is the usual and invariable course of proceeding; and even if this court should not be satisfied as to the usury, they will reverse the decree, that the proper reference to the master may be made, and that fact be clearly ascertained.

STENCER, J., delivered the unanimous opinion of the court.

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On the argument, it has been insisted, by the appellant's counsel,

1st. That the respondent having, in his bill of complaint, interrogated the appellant, as to the consideration for the note and mortgage, his answer, in relation to the usury, becomes evidence in the cause, and is not disproved.

2d. That it was not *Green's* intention to transfer the mortgage to *Hart*; and had it been so, nothing passed by the mere delivery, as the statute to prevent frauds and perjuries requires a deed or note in writing.

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*3d. That the decree is erroneous, in directing the whole amount of *Johnson's* note and mortgage to be paid to *Hart*, inasmuch as it was a security to him for 1,491 dollars and 11 cents only, the difference between which and *Johnson's* note being clearly due to *Green*.

With respect to the first point, it is to be observed, that the respondent was in possession of *Johnson's* note as endorser; and the fact of the absolute endorsement by *Green* was *prima facie* evidence of a full and adequate consideration paid for the note. The respondent was under no necessity of inquiring into it; but he did allege, that the consideration was a full and valuable one. This the appellant might have denied; and had it been incumbent on the respondent, he must have proved his allegation, or failed in the suit. The burthen of showing that the consideration was illegal or inadequate, rested on the appellant. When he goes into a charge of usury, he departs from the question put to him, which admitted only of an affirmative or negative answer; and it was wholly immaterial whether it was the one or the other. I view, therefore, the appellant's answer, charging usury, as insisting on a distinct fact, by way of avoidance. The respondents having replied, and given him an opportunity to prove the fact, and he having failed to do so, his answer is no evidence of the fact. This is a well established principle in chancery proceedings, and will be found recognized in every treatise on evidence in that court.

Courts of equity consider mortgages according to the essential nature of contracts, and give them operation according to the intention of the parties: the debt is, consequently, there esteemed the principal; and the land the incident; and whenever the debt is discharged, the interest of the mortgagee in the land ceases of course. There is, then, a manifest distinction between absolute estates in fee, and conditional estates for securing the payment of money. Mortgages are not now considered as conveyances of lands within the statute of frauds; and the forgiving the debt, with the delivery of the security, is holden to be an extinguishment of the *mortgage. (*Powell*, 3d edit. *Mort.* 54. *Barnard*, 90. *Richard v. Sims*. 2 *Burr.* 979.) If, however, a mortgage was within the statute, the circumstances of this case would exempt it from its operation.

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In case of the payment of the money secured by mortgage, in equity, a trust arises for the benefit of the mortgagor; so, where the debt thus secured is transferred by the mortgagee, he becomes a trustee for the benefit of the person having an interest in the debt. (2 *Anstruther*, 438.) In the case of *Martin v. Mowlin*, (2 *Burr.* 979.) Lord *Mansfield* lays it down, as an established principle, that the assignment of the debt will draw the land after it; and I cannot agree that this was an *obiter dictum* of the judge.

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In the present case, the mortgage was delivered to the assignee of the debt. Had it not been delivered, nor any thing said about it, I should have considered the respondent, on the failure of *Johnson* to pay the note, entitled to the aid of the mortgage. It was competent to the parties to agree that the mortgage should not be resorted to by the holder of the note; but the proof of such agreement lies on the appellant, and it should be explicit. The receipt furnishes no evidence of such agreement; it describes the real situation of the mortgage as not assigned. But this expression falls far short of an agreement that it was not to be assigned. It does not appear that the appellant had any rights prejudiced by the assignment of the mortgage; and it is impossible to evade the force of the fact of his depositing it in the respondent's hands. It speaks a language incapable of being misunderstood, and is decisive of the question. An issue, to investigate the intention of the parties, on that act, would have been useless. I therefore think, that the respondent had an equitable interest in the mortgage, equivalent to the amount of the principal and interest of his note, against *Green*.

I shall be very brief on the last point, because I understand the chancellor as saying, in assigning his reasons, that the question of distributing the fund, to be produced by the sale, is yet before him. The master's report furnishes him the necessary *data* on which to make a just distribution; and it would be unnecessary to give directions on that subject, the respondents not claiming any thing beyond the principal *and interest of the appellant's note, and his costs, to which I think him well entitled. The decree ought to be affirmed with costs. I cannot think, however appearances may be, that the respondent, or his counsel, considered the points now decided, as necessarily, or absolutely adjudged on the former appeal; and I am, therefore, disinclined to allow any thing beyond the taxable costs.

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It was, thereupon, ORDERED, ADJUDGED and DECREED, that the decree of the Court of Chancery complained of, be *affirmed*, and that the appellant pay to the respondent his costs, to be taxed, and that the record be remitted.

Judgment of affirmance.

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v.
UNIT. INS. CO.

WILLIAM J. ROBINSON and WILLIAM HARTSHORNE,
plaintiffs in error,
against
THE UNITED INSURANCE COMPANY, *defendants in*
error.

Goods were insured from New-York to Cadiz, St. Lucar or Malaga, and were consigned to the master, with directions, in case of accident, to send bills of lading to the correspondents of

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the insured at those places. During the voyage, the vessel was captured by a French privateer, and carried into Malaga, and was there condemned by the French consulate, as good and lawful prize. The property was abandoned to the insurers, who accepted the abandonment, and paid as for a total loss. The correspondents of the insured, at Malaga, at the request of the master, who did not know of the insurance, and without any instructions to that purpose, purchased the cargo of the captors, by means of a broker, and sold it, and after reimbursing themselves for the money advanced, invested the residue in a cargo of wine and brandy, which was shipped in the vessel for the

THE defendants in error brought an action of *trover* in the Supreme Court, against the plaintiffs in error, to recover the value of certain wines and brandies, which the defendants in error alleged to be their property. The plaintiffs in error pleaded not guilty. The cause was tried at a circuit court, in the city of New-York, on the 10th day of January, 1803, when the jury found a special verdict, in which the following facts are stated: The defendants in error underwrote two policies of insurance, for 10,000 dollars, on goods shipped by the plaintiffs in error, *at, and from New-York to Cadiz, St. Lucar or Malaga. The vessel and cargo were both owned by the plaintiffs in error, and were conditionally consigned to the master; if he arrived, with the vessel and cargo, safely at Cadiz, he was either to transact the business himself, or to employ, for that purpose, such persons as he chose. In case of any accident, the master was instructed to enclose bills of lading to O'Conner of Cadiz, or St. Lucar, and to the house of Grevigne & Co. at Malaga, directing them to follow the instructions of the master. On the arrival of the vessel off Cadiz, she was boarded by an English vessel of war, and ordered not to attempt to enter that port; upon which the master, agreeable to his instructions, steered for Malaga. On arriving in sight of Malaga, the vessel and cargo were captured by a French privateer, and carried into Malaga, where both vessel and cargo were condemned, by the French consulate at that place, as lawful prize. The vessel being in a leaky condition, (the captors having neglected to pump her,) it was apprehended both by the owners of the privateer, and the master, that the cargo, which consisted of sugar and cocoa, was damaged. Under this apprehension, after the condemnation of the vessel and cargo, without opening the hatches, the house of Grevigne & Co., to whom the master had applied, and communicated his instructions, purchased the vessel and cargo from the captors, by means of a sworn broker, for the sum of 15,565 dollars, which sum Grevigne & Co. advanced before the vessel and cargo were delivered to them by the captors, and before the state of the cargo was known. The purchase was made by Grevigne & Co., with the privity and advice of the master, who understood, at the time, that it was made for the benefit, and on account of the plaintiffs in error, and whomsoever else it might concern, and with a view of

serving the plaintiffs in error. *Grevigne & Co.* had not any interest or concern in the purchase, but *considered themselves as agents, and acting for the plaintiffs in error. *Grevigne & Co.* accordingly sent an account of the transaction to the plaintiffs in error; and in case any loss had occurred on the purchase, *Grevigne & Co.*, as they supposed, would have had recourse for the same against the plaintiffs in error. The cargo was afterwards sold by *Grevigne & Co.*, and the net proceeds of the sales thereof amounted to the sum of 30,174 dollars and 33 cents: out of which *Grevigne & Co.* retained 15,565 dollars, to reimburse themselves for the sum paid to the captors, for the vessel and cargo, and 9,461 dollars, part of the balance, was invested in brandy and wines, which were shipped at *Malaga*, on board the same vessel, by *Grevigne & Co.*, for account of the plaintiffs in error, and consigned to them at *New-York*, where the same were delivered by the master to the plaintiffs in error. The residue of the balance remaining in the hands of *Grevigne & Co.* was afterwards invested by them in wines, which were afterwards shipped for account of the plaintiffs in error, and delivered to them in *New-York*. The brandy and wines were sold in *New-York*, by the plaintiffs in error, and produced a profit of 3,611 dollars and 57 cents, including interest. As soon as the plaintiffs in error received notice of the capture, and before any notice of the said purchase, they abandoned their interest in the goods and merchandise insured, to the defendants in error, who accepted the same, and paid the plaintiffs in error as for a total loss. The cause was argued in the Supreme Court, on the special verdict, and a judgment given for the plaintiffs below;† on which judgment a writ of error was brought into this court.

Hoffman, for the plaintiffs in error. Here was a total loss of the property, by the capture and subsequent condemnation.‡ The captors had a right to sell, and the assured, or their agent, had a right to purchase *bona fide*. Any collusion between the captors and *Grevigne & Co.* is not pretended. A fraud in the purchase would no doubt render the sale void. *Grevigne & Co.* had no *motive to act collusively or fraudulently. They entered into the agreement of purchase with the captors, *bona fide*, for the benefit of the assured, and made use of their own funds for the purpose. It was a purchase made at the risk of the assured, or of *Grevigne & Co.* The sale was regular, and in the usual way; though not at public auction, it was made by *sworn brokers*, in the manner practised in many of the commercial countries of *Europe*. By the condemnation and sale, therefore, the property was completely divested from the original owner, and transferred to the purchaser, who has the absolute benefit of the purchase. It happened that the goods were sold for a profit. Suppose, however, that there had been a loss on the speculation, would the

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account and risk of the assured, who received and sold the articles. In an action of *trover* brought by the insurers against the insured, to recover the amount of the goods thus received and sold, it was held, that a purchase of property insured, by the agent or correspondent of the assured, is for the benefit of the owner, or insurer, after abandonment and payment, if he choose to affirm the purchase, and if the proceeds of such purchase, and a subsequent sale, are invested in other goods, they become the property of the insurer also, for which he may maintain *trover*, if he elect to confirm the acts of the agent.

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† See 2 *Caines*, 280. for the reasons of the court.

‡ *Abbott*, 9, 10

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defendants in error have been willing, or were they bound, to bear the loss? It would be unjust to give the assurer a right to elect in such a case, and take all the benefit of such purchase, without being liable for its loss; to wait until they ascertained whether the purchase was profitable or not, and to receive the gain, but avoid the loss. The assurers made no election, nor did they pretend to claim the benefit of the purchase, until after the goods arrived at *New-York*. It is a universal principle, that those who share in the profit must also share the loss. But all responsibility of the assurers, in case of a loss, is denied on their part. On what ground of equity or justice, then, can they claim the profit?

But, it will be said, the assured were the agents of the assurers. How are they agents? It is not enough to say they are so generally: it must be shown that they were so in this particular transaction. The clause in the policy only constitutes the insured agents as to the safety and preservation of the property insured. After a loss, that agency is at an end. They cannot enter into new contracts and speculations for the insurers. If the assured are the agents of the assurers in this transaction, the principals are bound by the acts of their agents, and the property *purchased must have remained at their risk; but this is denied by the defendants in error, nor is it admitted by the Supreme Court, in giving their judgment in this cause.

Admitting, however, that the plaintiffs in error were agents to the defendants in error, and liable to account, it cannot be in the form of action which they have thought proper to adopt. The action of *trover* will not lie in such a case. This is not a mere objection as to form; for the measure of damages may be very different in the different actions of *trover*, *trespass on the case*, or *assumpsit*. The objection is important and decisive against the recovery of the defendants in error, in their present suit. The action of *trover* is founded on property. There must be a property in the plaintiffs.† All the interest which the assurers could have in the property assured ceased at *Malaga*. They were entire strangers to the return cargo from *Malaga* to *New-York*; it was not at their risk.

The contract of insurance is no more than a contract of indemnity for the voyage insured. It cannot be extended beyond the termination of the voyage. The insured, considered as agents of the insurers, under the clause in the policy, can be liable only for the salvage at *Malaga*, where the amount saved, of the property insured, was to be estimated and settled. The salvage must be the rule for estimating the average.‡ After the purchase, the assured might dispose of the goods at their pleasure, and invest the proceeds in other property, for their own account. If a factor should sell goods of his principal, *bona fide*, and should, afterwards, invest the proceeds in other goods, on a speculation of his own, he can be accountable only for the proceeds of the first sale. The principal cannot be entitled

† 3 Bl. Comm.
152. 156.

‡ *Da Costa v. Newnham*,
2 Term Rep. 407.

to the profits of every subsequent purchase and sale, which the factor may think proper to make with the funds in his hands.

Riggs and Harison, for the defendants in error. It appears, from the master's evidence, that *Grevigne & *Co.* purchased the goods for the plaintiffs in error and *whomsoever else it might concern*. It is immaterial, however, for whom they intended to act, for, in judgment of law, they must be considered as acting for all concerned. In every case of an agent abroad, who acts from necessity, and without a knowledge of the contract of insurance, he will, of course, act for the owners; either the original owners at the time, or for those who have become owners by the subsequent cession and abandonment of the property. The right of abandonment, in this case,† is not denied. The effect of it, when accepted, is to transfer the property as fully, and as effectually, as a bargain and sale.‡ It is, then, irrevocable, except by mutual consent.§ This abandonment is a voluntary act of the assured, and generally made for his own benefit; for it seldom happens, that the insurer gets more than a wreck, a remnant of property. If, after the abandonment is accepted, and the money paid, the subject insured be released, the insurer cannot compel the assured to refund the money; but must stand in the place of the assured.|| This transfer is retrospective as well as prospective. The insurer takes the property as it was at the time of the loss, and is entitled to all the benefits derived from it, and all the profits of the voyage.¶ The insured is entitled to nothing but the amount insured. Every subsequent benefit or compensation arising out of the property belongs to the insurer. A consequence of this doctrine is, that the agents of the insured, in relation to the property, become the agents of the insurer, and all their acts, if they choose to adopt them, enure to their benefit. Was the condemnation at *Malaga* such as to give the assured, or their agents, a right to purchase on their own account, and was the property of the original owners divested? It was a condemnation by the *French* consulate in a neutral port.(a) Even admitting the condemnation to have been legal, the sale was not made by an order of court, and was, therefore, irregular.

*This may be considered as analogous to the case of *ransom*, which is the paying of a certain sum of money, to redeem property taken by an enemy.†† In case of an abandonment, after capture, and a subsequent ransom, the insurer may take the property, and pay the ransom. Or, if there be no abandonment, the owner keeps the goods, and the insurer pays the ransom, as a partial loss. The whole transaction at *Malaga* is equivalent to a ransom. In the case of *MP Masters v. Shoolbred*,†† Lord *Kenyon* decided that the master, who purchased

(a) This question is so fully discussed, and so well settled, in the case of *Wheelwright v. Depeyster*, ante, p. 471, that it is unnecessary to repeat the arguments and authorities cited by the counsel here.

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† *Marshall*, 483.

‡ *Marshall*, 525.

§ *Ibid*, 519.

|| *Marshall*,
485. 524. *Burr*.
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¶ *Marshall*
519. 522, 523.
Le Guidon, ch.
7. art. 12. 1 *Ves*.
98, 99. *Randall*
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†† 2 *Douglas*,
649. 8 *Term*
Rep. 269. *Havilock*
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†† 1 *Esp. Cos.*
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in note, and see
2 *Caines*, 286.† 1 *Caines*, 292.
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the vessel, after capture, at public auction, was the agent of the owner, and there being no abandonment in that case, the insured recovered only for a partial loss, being the sum paid for the vessel and repairs. The vessel was sold as a *prize*, by the authority of the *French* consul at *Charleston*, and it is to be inferred, that there was a condemnation; yet the court considered it as analogous to a ransom. That there was no abandonment in that case can make no difference in the principle, which is perfectly applicable to the one now before the court. The case of *Saidler and Craig v. Church*† was decided in this court on the same principle. It is said that the authority of that case is shaken by that of *Abbott v. Broome*;‡ yet, if it be attentively examined, it will be found precisely analogous to the present. The master was considered as an agent *from necessity*, and for the owner. So if a merchant who sends goods not ordered, the person to whom they are sent becomes, from necessity, the agent of the owner, and may sell them for his account.

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Then what are the reasons urged against the recovery of the defendants in error? It is said, there is no property in the plaintiffs below to support an action of *trover*. This objection is now made for the first time; it was not suggested on the argument before the Supreme Court, and is, indeed, of no weight. By the abandonment, all the rights and incidents in regard to the subject were transferred to the insurers. *Grevigne & Co.* became substituted as their *agents, and their acts must *enure* to the benefit of the insurers. The purchase or ransom was an act relative to the property. For whom did *Grevigne & Co.* purchase and invest the balance in goods? For the *owners*, not for themselves. When the goods arrived at *New-York*, the insurers had a right to affirm the acts of their agents, and take the property. If so, they may maintain *trover*. Had they given express orders to invest the proceeds, there could be no pretence for this objection. The affirmance or ratification of the acts of an agent is equivalent to an original order. *Omnis ratihabitio mandato comparatur.*

Again, it is said, that the property was changed by the condemnation, and that the insured might purchase, *bona fide*, for his own account. This is begging the question. The insured or his agent must be considered as standing in the relation of *trustee* for the owners; he, therefore, could not fairly purchase for his own account. An executor cannot purchase a debt due the estate of the testator, for his benefit. *Trustees*, *assignees*, or persons having a *confidential* character, are not allowed, from principles of justice and policy, to become purchasers; but all their acts *enure* to the benefit of the *cestuy qua trust*.§ In the case of *Plantamour and others v. Staples*,|| the goods saved were sold, and the proceeds invested in other goods, by a correspondent of the assured; and Lord *Mansfield*, considering this as being the best mode of sending home the

§ 8 *Ves. Jun.*
ex parte *James*,
345, 346.|| 1 *Term Rep.*
511. in note.

proceeds, and for the benefit of all concerned, held these acts of the correspondent to be binding. But, suppose it otherwise, it does not follow that an agent, who purchases at his own risk, shall, therefore, retain the property. In the case of an executor or trustee, who purchases, if the purchase turn out bad, he cannot throw the loss on his *cestuy que trust*. A trustee may render the estate of the *cestuy que trust* better, but he cannot make it worse. This salutary principle, established as a safeguard to society, becomes more necessary in regard to agents in foreign countries, where the temptations to fraud are stronger, and the means of concealment greater. Will *this court sanction a contrary doctrine, by which owners of property would be bound hand and foot, and left to the mercy of foreign agents?

That the property was sold by *sworn brokers*, cannot vary the case. That may be one of the modes of veiling a secret negotiation between the captors and the agent of the assured. But, by the general principle, the agent purchases for the benefit of the parties concerned: this renders all inquiry into the transaction unnecessary. No person can be a loser, who ought not to suffer.

Radcliff, in reply. The purchase made by *Grevigne & Co.* was expressly for the assured. They advanced the necessary funds for that purpose, on the credit and for the account of the assured. The words, "whomsoever else it might concern," in the testimony of the master, were words of course. It was, in truth, a purchase solely for the plaintiffs in error. If the defendants in error had a right to recover, it ought to be for no more than the sum insured, and not the whole amount of the goods. There may be other insurers on the same property, who are entitled to their share, besides the owners of the ship, and the residue of the cargo. The defendants in error ought not to take the whole.

Admitting the doctrine about the right of election to be sound, it ought not to exist for an indefinite period of time. The insurer should make his election within a reasonable period, and not wait until he ascertains whether the speculation is profitable or not. If not made in a reasonable time, it ought to be considered as waived.

The objection to the action of *trover*, in this case, is not merely formal; yet, if the form of action were erroneous, the judgment below ought to be reversed. If the insured were agents to the insurers, they were liable as such; and, in an action for *assumpsit*, on an implied contract, they would be entitled to their commissions on the sale of the goods. But, by considering them as wrongdoers, and bringing *trover* against them, they are deprived of any allowance for commissions. The only rule of damages is the value of the goods at the time of the conversion.

*The case of *Abbott v. Broome*, as well as that of *M^r Masters*

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v. Shoolbred, arose on an insurance on the vessel, which stands on distinct grounds from an insurance on goods. The object of the vessel is to carry freight, and return home. Insurers have nothing to do with purchase or sale, with the rise or fall of markets, profit or loss. As they are not to sustain a loss on account of markets or trading, it is no more than just that they should not receive a profit.

The doctrine of *election* applies only to authorized agents in fact. What right have the insurers to call on *Grevigne & Co.* as their agents? *Grevigne & Co.* might say to them, We do not know you; we acted for others. If the right of election be admitted, it must necessarily involve the insurers in all the fluctuations of a market, and the consequences of trade.

THE CHANCELLOR. Three reasons have been assigned by the plaintiffs in error for the reversal of the judgment in this cause.

1. Because the defendants in error had no property in the wines and brandy shipped for *New-York*.

2. Because, after condemnation of the goods insured, the property became changed, and it was competent for the insured to purchase the same fairly, and without fraud; and,

3. Because *Grevigne & Co.*, in this instance, purchased fairly, with *their own funds*, and at *their own risk*, or at the risk of the plaintiffs in error; and in case of loss in the bargain, neither *Grevigne & Co.* nor the plaintiffs in error could ever have claimed any compensation from the insurers for such loss.

In the argument, on the first point, the plaintiffs in error have alleged that the policy was on the cargo only; that the purchase embraced both vessel and cargo, and that the damages having been given on the whole, the defendants have recovered beyond their right.

This, therefore, requires to be preliminarily examined; for if the allegation can be sustained, as the damages are blended, and as there is no criterion to separate or apportion *them, it would seem that gross injustice must, in that case, result from the judgment.

From the special verdict, it appears that the vessel and cargo were purchased by *Grevigne & Co.* at 15,565 dollars; that the cargo was afterwards sold by them, and that the net proceeds of such sale amounted to 30,173 dollars and 33 cents, out of which *Grevigne & Co.* retained the sum expended in the purchase of the vessel and cargo to reimburse themselves. Hence it is evident that some portion of the production of the sale of the cargo was applied to the purchase of the vessel, as the sum of 30,174 dollars and 33 cents was exclusively produced from the sale of the cargo, and with 15,565 dollars both vessel and cargo were purchased. Of consequence, instead of blending both the vessel and cargo in the sale, they are clearly distinguished; and, instead of the defendants in error

having recovered beyond their right, they have recovered so much less as the relative value of the vessel bore to the cargo. If so, it cannot consist with the allegation of the plaintiffs in error, that the judgment of the court below is to their injury; and it does not lie in their mouths to allege that it is to the injury of the defendants. This ground, I have, therefore, no doubt, must fail.

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All objections, originating solely in formal defects in the proceedings, will always be yielded to with a considerable degree of reluctance; for if they are permitted to prevail, they compel the parties to run a new career over the whole ground of litigation, to terminate precisely at the point at which they are stopped, before they can have their cause decided on the merits, in this court. I see, however, nothing in this case which requires the extension of indulgence, or an effort to surmount difficulties, arising from technical forms. To place the subject in a new point of light, it is only requisite to invert the order of examination, so as to discuss the merits before the rules for testing the forms are applied; and on this inversion it will be perceived, that the inquiry, as to the first objection, must be directed to the *gist* of the action.

*The present case is rather of an uncommon complexion in the history of insurance causes. Instead of presenting, as a question, which party should bear a positive loss, a decision which frequently excites sympathies at variance with the inflexible duties of the judiciary, this court is merely called upon to decide who is entitled to the profits of an adventure, relinquished by one party as unprofitable, and by the other submitted to as an inevitable evil; but which ultimately proved beneficial beyond the expectations of either.

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This is, certainly, a favorable occasion for the decision of a general principle, which, as a leading case, will influence a decision on all similar cases in future.

The merits of this cause have been brought into view in the discussion of the 2d and 3d points.

As to the second, I have, on a former occasion, been led to remark to this court, that, from the nature of maritime adventures, much is unavoidably hazarded by the insurers, beyond the mere marine risk: combinations difficult to develop, and unfair speculations at their expense, may often enlarge their responsibilities beyond the fair intent of their stipulations; especially, as the contingencies to which the subjects insured are exposed often place them in situations which the most comprehensive view of their probable occurrence cannot always devise means to reach. Much must, therefore, depend upon the integrity of the persons who may, either by express agency in consequence of the appointment of the parties, or by occasional interposition for the benefit of either, intermeddle with those subjects. Hence, transactions relating to them are tested by rules calculated to enjoin the observance of the purest

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good faith, and to repel every temptation which may exert improper motives, or a disposition to sacrifice the interest of one of the parties concerned, in order to promote that of the other. Among those rules, none is better adapted to effect this salutary object than the one which, disregarding the means by which the property insured is retained by the insured, holds it responsible in its application to the mitigation of those losses, the indemnity against which was the avowed and exclusive object of the policy.

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*That arbitrary notions, concerning the change of property by capture, ought never to be the rule of decision, contrary to the real fact between insurer and insured, upon a contract of indemnity, was the doctrine of Lord *Mansfield*, whose opinion, particularly on the subject of insurances, is deservedly highly respected, so early as the year 1761, in the case of *Hamilton v. Mendez*. (3 *Burr*. 1209.) This doctrine has not been shaken by subsequent decisions. The opinion expressed by the court below, upon rendering judgment in this cause, I think is conformable to this doctrine, and the reasoning on the occasion so forcibly concludes to this point, as to satisfy my mind that the judgment, on that reasoning, ought to be sustained.

As to the third point: *Grevigne & Co.* acted in the purchase of the vessel and cargo in concert with the captain, and by his advice. Letters had been addressed by the plaintiffs in error to that house; the former valued themselves on it, for some kind of aid or protection, in case of capture. To what extent they were entrusted does not appear, and whether they acted in compliance with instructions, or from their own impressions merely, is not disclosed; nor is it material, as it appears that they acted for the benefit of the plaintiffs in error. If this conduct was regulated by instructions, no doubt could possibly have been entertained on the subject. If they interposed as volunteers, and without such instructions, they did so at their peril. The plaintiffs in error might, in that case, have disaffirmed their acts as agents. But if they affirm them, they were, as a necessary consequence, adopted and sanctioned throughout, and the investment of the proceeds of the sale of the cargo in the wines and brandy, would have been as much an object of that affirmance, as the purchase; for there is not the least pretence that *Grevigne & Co.* have not acted with the utmost fairness throughout. They advanced the money to make the purchase, in the first instance, out of their own funds. But even this advance was connected with the subject insured; and they did not make it as mere strangers, purchasing at hazard. The vessel and cargo carried a credit with them, intrinsically, *to a certain extent. Their adviser in the purchase was the captain, perfectly acquainted with the species and quantity of the cargo, best qualified to make the requisite estimates of the probable effects which the not pumping the ves-

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sel, after its capture, might produce on the cargo; and they were acquainted with the state of the market which was at their door. All these circumstances gave them advantages in the purchase, which they enjoyed exclusively, and in a degree nearly equal to what others would have had, if the hatches of the vessel had been opened; and all these advantages, the knowledge of the state of the market excepted, they possessed, in consequence of their acting in concert with the captain, the avowed agent of the plaintiffs in error. As soon as *Grevigne & Co.* had the cargo in their power, they sold it, deducted their advances from the proceeds of the sale, invested the surplus in wines and brandy, and remitted them to the plaintiffs in error, *for their benefit*. If it be necessary after those facts are established, to resort to other evidence to show the intent of the purchase, the captain, it is found by the jury, understood it was made for the benefit, and on account of the plaintiffs in error, and whoever else it might concern.

These circumstances show that the purchase was made for the benefit of the plaintiffs in error, and to mitigate their loss, and if that was the case, the whole interest of the plaintiffs having devolved upon the defendants, the purchase *enured* to their benefit. It is, therefore, necessary, briefly to advert to so much of the doctrine of abandonment as may apply to the subject.

Whenever a loss accrues, which, from circumstances, applying the rule of technical total loss, may, in the result, prove either partial or total, an abandonment becomes necessary, to consummate the right of the insured to a total loss. The acceptance of the abandonment, by the insurer, and a consequent satisfaction of the policy, vests the property saved in the insurer, and, in its effect, has a relation to the event which produced the loss, though *necessarily modified by the subsequent circumstances in which it may have been placed, in the intermediate time, between the loss and abandonment. A suspension of the acceptance can have no other effect than to enable the insurer, by possessing himself of the knowledge of all circumstances, to ascertain the extent of his liability on the policy, whether for a total or partial loss. If partial, the abandonment does not, of itself, conclude him; if total, he, as a legal consequence, succeeds to the right of the insured, as to the property saved, *cum onere*. The time of acceptance can, therefore, have no influence on the determination of this cause, as the adjustment of the policy fixed the rights of the parties, by their voluntary and mutual acts, on the question of abandonment; and whatever part of the subject insured was saved, became the property of the defendants in error, in the precise state it then was; for the plaintiffs have devolved all their rights, subject to all its burdens, and the contingencies to which it was exposed, as well from management as transmission, upon the defendants.

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The wines and brandy, having been purchased with the proceeds of the cargo insured, and shipped by persons assuming to act as agents of the insured, if in their progress to the port of destination, they had been wholly destroyed, the loss, as between the insured and insurer, must have been borne by the latter; for, in that case, to what could the abandonment have attached? Not to the money which *Grevigne & Co.* had received for the cargo, for that they had parted with in the new investment; not to other property of the insured, for it had no connection with the subject insured. Though among the rights devolved upon them by the abandonment, was that of affirming or disaffirming the acts of *Grevigne & Co.*, what beneficial purpose was to result to them, from a measure of that kind? If they affirmed the acts of *Grevigne & Co.*, those acts had consigned it, in their effect, to destruction. If they disaffirmed, *Grevigne & Co.* would have held the property *as their own; for a disaffirmance could not be partially exercised.

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This train of reasoning has convinced me, that the wines and brandy became the property of the defendants in error by the abandonment; that the abandonment, relating back to the event occasioning the loss, included the investment in the wines and brandy; that the profits were an inseparable incident of such investment, and that the defendants in error are entitled to them.

This doctrine does not expose insurers to the great risks represented to flow from it. Whatever is necessarily connected with the subject insured, and within the purview of the policy, they are bound, by its legal construction, to take the risk of; but beyond that, their rights are effectually protected, by the power of affirming or disaffirming an agency in the concern.

I shall now recur to the objection as to the form of the action. It is certain, that this action can only be sustained by a person having either an absolute or qualified property in the chattels for which it is brought. I have already given my reason for deciding that the defendants had a property in the wines and brandy; if so, the sale operated as a conversion: but this point is waived by express consent.

It has been objected, that the property of the defendants in error, if they had any, was mixed with that of the plaintiffs, so as to be incapable of precise specification, and that *trover* will not lie by one person, holding in common with another, against such other. It cannot be useful to examine the law on this latter objection, until it is ascertained that the fact, to which it is intended to apply, exists.

The community of property relied on, is attempted to be inferred from those parts of the special verdict which state that the defendants in error underwrote two policies for 10,000 dollars, on *goods and merchandise* on board of the *Apollo*; that both vessel and cargo were owned by the *plaintiffs in error;

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that both *vessel and cargo* were condemned, and afterwards purchased by *Grevigne & Co.*; that the *cargo* was afterwards sold for 30,174 dollars and 33 cents, and that after reimbursing themselves, they invested the balance in wines and brandy, which were consigned to the plaintiffs in error. I have already adverted to the circumstance, that the 30,174 dollars and 33 cents were the proceeds of the cargo exclusively; there is no fact found, from which it can be legally intended, that the cargo insured was not the whole embarked on board the vessel. The difference between the valuation in the policy, and the account of sales, might have been produced by the different state of the market at the port of shipping and that of discharge; this, from the ordinary fluctuation of markets, must be the most uncertain of tests, and cannot operate to establish the existence of any other parcel as composing the cargo, than what was insured.

I am, for these reasons, of opinion, that the judgment of the court below ought to be affirmed.

WOODWORTH, Attorney General. This cause having been decided in the Supreme Court, after solemn argument, in favor of the defendants in error, we are now called upon to review that decision, and pronounce judgment in the last resort. I have considered attentively the reasons assigned by the plaintiffs in error for reversing the judgment of the Supreme Court, and feel peculiar satisfaction, that in a cause somewhat important, as it respects the amount in controversy, but much more so as it respects a great principle in the law of insurance, I have no doubts in my mind in deciding on the question before us.

The plaintiffs in error contend,

1. That the defendants in error have no property in the wines and brandies shipped to *New-York*.

2. Because, after condemnation of the goods insured, the property became changed, and it was competent for the assured to purchase the same fairly and without fraud.

*3. Because *Grevigne & Co.* purchased fairly with their own funds, and at their own risk, or at the risk of the plaintiffs in error; and in case of loss in the bargain, neither *Grevigne & Co.* nor the plaintiffs in error could ever have claimed any compensation from the insurers for such loss.

I will briefly examine these positions, though not in the preceding order, inasmuch as the decision of the first point will depend very much on the opinion formed on the other two.

The plaintiffs in error abandoned as soon as intelligence was received of the capture. The defendants in error accepted, and on the 5th day of *October*, 1799, paid as for a total loss. These being facts admitted by the special verdict, it becomes material to consider what consequences result from them, and what rights were thereby acquired by the insurers.

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On accepting the abandonment and payment to the insured, the nature of the contract, as well as the settled law on this subject, put the insurer in the place of the insured, and all acts done by the agents of the latter, in relation to the property abandoned, *enured* to the benefit of the former. A contrary doctrine would change the policy from a contract of mere indemnity, and would permit the insured to speculate in the purchase of the property abandoned. This practice the law has, in my opinion, wisely prohibited. The rule is calculated to prevent fraud, and materially to promote the interests of commerce, for the benefit of which insurance was originally introduced. To apply this principle to the case under consideration, I consider, that after the abandonment, the master, as well as *Grevigne & Co.*, became the agents of the insurers, although, at the time of the purchase of the vessel and cargo at *Malaga*, and the subsequent investment of the proceeds in brandy and wines, they probably supposed that they were acting solely for the assured. Whatever might have been their impressions cannot be material, as they *cannot vary the law on this question. They had no knowledge of the abandonment, and therefore purchased for the benefit of the plaintiffs in error, and whomsoever else it might concern. The assurer, being substituted by law in the place of the assured, was entitled, at his election, to the benefit of the contract made by *Grevigne & Co.* with the advice and consent of the master. But it is said, however correct this may be as a general principle in the law of insurance, it cannot operate after a capture and condemnation; for in that case the property is changed, and a purchase made by the assured shall accrue to his benefit, because he is liable to all risk, and if a loss happens, or the speculation turns out unfavorably, it must be borne by him.

Now, though it be admitted, that, after condemnation, the property becomes completely changed, and that a purchase made by a stranger would give him a good title against all the world; yet I do not perceive that this will aid the plaintiffs in error; for the ground of recovery against them is, that this purchase was made, not by a stranger, but by persons standing in the relation of agents to the assured, and for their benefit, as was believed at the time. If, then, the defendants in error, after abandonment and payment, acquired all the rights incident to the property, which the assured once had, it clearly follows that they had an absolute property in the cargo from the time *Grevigne & Co.* purchased. The subsequent investment of a part of the proceeds in brandy and wine, by the same agents, and with a view to benefit the assured, was a continuation of the agency, and vested the property in the assurers at their election.

I do not find that any of the cases controvert this doctrine, or establish a principle, that after condemnation the assured or his agents may purchase, for their own benefit, the property

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condemned, and that such purchase is considered on the same footing as if made by a stranger.

*The case of *M^r Masters v. Shoolbred*, (1 *Esp. Rep.* 237.) is, in my mind, an authority governing the present question. Until that be shaken by different decisions, the law may be considered as well settled. From this view of the subject, it is not material to examine the efficacy of a condemnation by the *French* consulate at *Malaga*, whether the vessel and cargo were sold under the authority of the court, or whether any thing was done by the captors which could be deemed a disaffirmance of the condemnation.

If it be granted that *Grevigne & Co.* purchased at their own risk, or at the risk of the plaintiffs in error, and in case of loss in the bargain, neither could have ever claimed any compensation from the insurers for such loss; this, in my opinion, is not material. It is irrelevant to the question under consideration, which depends on certain principles, defining the rights of the insured, in a case circumstanced like the present, adopted with a view to prevent an insurance from becoming any thing more than a contract of indemnity, and to guard against frauds which would be difficult to detect, if a different rule were established.

There is not, in my mind, any hardship in this rule. The master or agents are presumed to know the law, and must be sensible that no obligation is imposed on them to interfere or purchase the vessel or cargo. It is absolutely at their election to do so, and, consequently, they need not run any risk. It is not probable they would ever be disposed to embark in a doubtful speculation. Their conduct, in this respect, will ever be regulated by extreme prudence and caution. If a certain prospect of gain by purchase present itself, the master, or agent, acting with good faith, will avail himself of the advantage, believing that the insurer will ratify the contract, and if he does not, no loss will be sustained, for he is certain that the goods or vessel will yield a clear profit. *Grevigne & Co.*, as well as the master, were satisfied of this when they purchased. *The price given for the vessel and cargo, at *Malaga*, was 15,565 dollars, and the net proceeds of the cargo, at the same market, were 30,174 dollars and 33 cents. The agent, therefore, would justly have been exposed to censure, if, in so plain a case, he had not interfered to alleviate the loss of those concerned.

I subscribe to the correctness of the rule, that the insurers ought to decide, immediately after notice, whether they will avail themselves of the purchase made by the agent. I presume they did so in this case. It is admitted that there was a demand made on the plaintiffs in error for the brandy and wines, and a refusal to deliver on their part; and the special verdict states that they were sold in *New-York*, and netted 3,611 dollars and 37 cents. The vessel and cargo arrived at *New-*

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York, in October, 1799; the demand and refusal must have been shortly after; for it is stated, that the action of trover was commenced in the Supreme Court in the term of January, 1800. These premises will warrant the conclusion, that the insurer made his election promptly after notice of the repurchase, particularly as no proof was adduced by the assured to fix the time with certainty.

But it is contended by the counsel for the plaintiffs in error, that in *trover* the plaintiff must have an absolute property in the chattels attempted to be recovered, and having failed in making out this, the defendants in error were not entitled to recover. That a general or special property is necessary, will not be denied; and if the reasoning on this case be correct, it follows,

1. That the master and *Grevigne & Co.* were, by law, agents for the insurer, in the repurchase of the vessel and cargo, notwithstanding the condemnation.

2. That, being such agents, in judgment of law, they made the purchase for the benefit of the insurer.

3. That the proceeds of the cargo, or a part of them, having been invested by the same agents in the wines and brandy, for the benefit of the concerned, who, *by law, are the defendants in error; and the defendants in error having elected to ratify the contract, they, from that moment, had an absolute property in the goods, and, consequently, could maintain *trover*.

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4. The sale of the wines and brandy was a conversion; and on proof of the preceding facts, the insurers were entitled to a verdict. I do not perceive any difficulty, in this form of action, of allowing a defendant, in mitigation of damages, any charges necessarily incurred respecting the property for the recovery of which an action of *trover* is instituted. It is, therefore, immaterial to say, that no set-off is admissible, when the same object is obtained under the plea of not guilty.

From this examination of the cause, I am of opinion that the plaintiffs in the court below were entitled to recover, in the present form of action; and, consequently, that the judgment of the Supreme Court ought to be affirmed.

CLINTON, Senator; after stating the facts in the case. More importance appears to have been attached to this cause than can arise from any intrinsic difficulties attending it. The effects of an abandonment and acceptance, in ordinary cases, are not denied. The property abandoned is transferred to the insurer, and is as completely vested in him as if it had been the subject of a bill of sale. All the benefits, therefore, derived, or derivable from this acquisition, must enure to him. The insured cedes to him all his right, title and interest in the subject insured, or in what may be saved out of it. In regard to the insurer, the abandonment has a retroactive effect, and he is considered as having been proprietor of the thing insured,

from the commencement of the voyage. Though it generally happens that insurers are losers by accepting the abandonment, yet extraordinary events do sometimes occur, by which they are not only completely indemnified for the amount they have paid, but gain a profit; as in case of the safe arrival of a ship, after an abandonment for a total loss. So in case of a capture, the insured, after an abandonment, if the vessel be *released, or recover her liberty, will have all the benefit of the adventure.

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The case before the court is of this description. The cargo is abandoned on account of the capture, and the insurers pay the full amount insured. The cargo is purchased, by an agent, or correspondent, from the captors, and sold, and after deducting the money advanced, the residue of the proceeds are invested in other goods, and remitted to *New-York*, to the supposed owners. It is said, that there are circumstances in this case which distinguish it from the effects of an ordinary abandonment. It is alleged, that there had been a condemnation of the property, and that the insured, as well as any other person, had a right to purchase on their own account. But the whole transaction clearly shows that the purchase was made for the assured, without any knowledge of the insurance or abandonment. *Grevigne & Co.* acted as the agents of the owners. They purchased the cargo at a low price, and sold it at a high one. To induce the captors to sell at a low rate, the right of appeal was surrendered by the compromise. The right of appeal belonged to the insurers, after abandonment: and they ought not to be deprived of it, without receiving the benefits which may have resulted from the sacrifice.

The legality of the *consular tribunal* at *Malaga* may well be doubted.† The sale in this case was not made by the order of any court. It was a private bargain with the captors, who thought it, under all circumstances, an advantageous compromise for them. If the doctrine contended for, on the part of the plaintiffs in error, were to prevail, a wide door would be open for fraud. If the assured be at liberty to divest himself of the trust he holds for the insurer, in case of any accident happening to the property insured; if the master can disembarass himself of his implied agency for the persons concerned, and if the consignee may renounce his express agency for the assured, and either of them may enter the market and purchase the property for his own benefit, it must be attended with great injury to the rights of the principal. If a condemnation so changes the property as *to put an end to the obligations of trustees and agents, we have only to suppose the property uninsured, in order duly to estimate the pernicious consequences of such a doctrine. The captors will be induced to sell low, and the agent, upon whom the owner relies for the protection of his interests, will be tempted to speculate, and to turn the loss of his principal to his own advantage.

† See *Wheelwright v. Depeyster*, ante, p. 471.

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Considering, then, the insured, after an abandonment, as a trustee for the insurer, he is to be governed by the salutary principle that forbids a trustee from becoming a purchaser for his own benefit. If the insurer be substituted in the place of the original owner, the agents of the latter become thereby the agents of the former. It is objected, that it is hard and inconvenient that the insurers should not sustain a loss, arising from such a purchase and sale, and yet should be allowed to receive the gain, if it turned out profitable. But the negotiation in this case is either the result of the implied agency of the master of the ship, or of the express agency given to him and *Grevigne & Co.* If it proceeded from the former, then both the insured and insurer are bound by the acts of the master, who, from the nature of his office, is authorized to do whatever he shall deem most conducive to the interests of all concerned; if from the latter, then neither the insured nor insurer are bound by the acts of the agents. They acted at their peril; and the principal may affirm or disaffirm their acts, at his pleasure. If the speculation be beneficial, there is no doubt that the principal will ratify it. If it be disadvantageous, he must bear the loss occasioned by his negligence or misconduct. It is not probable that an agent will act, *bona fide*, against the interest of his employers; and if he acts with good faith, it can rarely happen that his conduct will not be approved.

If these principles be just, the objection to the form of action is of no avail; for, by the abandonment, all the property and its incidents were transferred to the insurers. It remained vested in them, until they made their election to disaffirm the purchase, and subsequent investment. For these reasons, I am of opinion that the judgment of the Supreme Court ought to be affirmed.

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The majority of the court being of the same opinion, it was, thereupon, ORDERED and ADJUDGED, that the judgment given in the Supreme Court be affirmed, with double costs, and damages, and that the record be remitted, &c.

Judgment of affirmance

THE NEW-YORK INSURANCE COMPANY, *plaintiffs in error,*
against
 WILLIAM I. ROBINSON, *defendant in error.*

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THE defendant in error brought an action against the plaintiffs in error, in the Supreme Court, on two policies of insurance. The policies were open, and the insurance was declared to be "upon the interest of *William I. Robinson*, being the allowance made with him as supercargo, as per agreement with the owners of the ship *Mary*."

On the trial of the cause, the jury found a special verdict, which contained the following facts. The plaintiff, being part owner of the ship *Mary*, and her cargo, contracted with the other owners, to go in the ship, on her voyage to the *East Indies*, as supercargo, on the terms specified in the following agreement: "We, the subscribers, owners of the ship *Mary*, having engaged *William I. Robinson*, as supercargo, on her intended voyage from hence to *Batavia*, and possibly to *Canton*, have agreed, in consideration of his undertaking and executing the duties of that trust, to pay him 10,000 dollars, out of the proceeds of any cargo the ship may bring from *Batavia*, *or to deliver him part of such cargo, to that amount, at the current market price, on his arrival here, at his option. But if the ship should proceed to *Canton*, and the letter of credit with which she will be furnished should be availing, we, in that case, agree to pay him 12,500 dollars, as above, otherwise, he is to receive no more than 10,000 dollars, the same as if the voyage out had terminated at *Batavia*. Signed by the owners of the ship, and by *W. I. and Sylvester Robinson*." In consequence of this contract, *W. I. Robinson* and *Sylvester Robinson* entered into the following agreement with the owners: "We agree, in consideration of the sum to be paid *William I. Robinson*, as herein specified, to take upon ourselves the trouble and management of the sale of the return cargo from *Batavia* or *Canton*, free of commission, subject to the directions of a majority of the owners of the ship *Mary*."

The vessel proceeded on her voyage, and arrived safe at *Batavia*, where, having sold the outward cargo, and taken on board a return cargo, she set sail from that place, on her voyage to *New-York*. During her voyage home, she met with such severe weather, as induced the master, after a consultation with the crew, to put into *St. Christopher's*, where she arrived in a disabled state. It became necessary to have the ship surveyed; and on a joint application of the master and supercargo, the Court of Admiralty in that island ordered her to be surveyed and unladen; after which she was again

The owners of a ship and cargo agreed with *R.* who was to go as supercargo, on a voyage out and home, to pay him a gross sum out of the proceeds of the return cargo, or to give him goods out of it to the amount, at his election, and in consideration of which, *R.* and his partner engaged to sell the return cargo, free of commissions.

On her homeward voyage from *Batavia* to

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N. York, the vessel was compelled, by stress of weather, to put into *St. Kitt's*, where the cargo was sold from necessity, by merchants there, on commission; part of the proceeds were vested in other articles, the produce of the island, and brought to *N. York*. *R.* having effected a policy of insurance on his commissions as stipulated in his contract with the owners, on their refusal to pay him, he abandoned as for a total loss, and brought his action against the insurers to recover the amount; and it was held, that as the return

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cargo did not
arrive at New-
York, R. lost
his commis-
sions, and was
therefore en-
titled to recover
the amount of
his insurers.

ordered to be surveyed. Upon the second survey, the surveyors reported, "that having accurately and carefully examined the said ship, and considered of the repairs necessary, they do certify, and declare, upon their oaths, that they are unanimously of opinion, according to the best of their skill and judgment, that the said ship cannot be repaired for the full value of her when repaired, and that she is in such a state and condition, without particularizing the several damages *she has received in her hull, as well as rigging, that it would be dangerous and unsafe to reload the cargo, and proceed with her on the voyage, and to repair her would be highly detrimental to the interests of the owners or underwriters on the said ship and cargo."

Upon this report, the master and supercargo applied for leave to sell the cargo, which was sold by merchants, on commissions. By the existing laws of the island, the cargo could not have been shipped from thence in any other vessel. The defendant in error bought in the vessel, for account of the owners, and in the following spring invested part of the proceeds of the cargo in rum and molasses, which, being a light, buoyant cargo, she was able to bring it to *New-York*, after undergoing some trivial repairs, though she could not have been rendered adequate to bringing on her original cargo, unless at an expense of more than her value.

An abandonment was duly made by the defendants in error, and an action brought thereon to recover for a total loss. On the argument of the cause, on the special verdict, the court below gave judgment for the plaintiff below, for a total loss; to reverse which the present writ of error was brought.

The reasons of that judgment may be seen in 2 *Caines*, 360, and 361, in which Mr. Justice *Tompkins* delivered the unanimous opinion of the court.

Hoffman, for the plaintiffs in error. The only inquiry in this case is, whether the owners of the vessel and cargo, or the plaintiffs in error, are bound to pay the defendant in error, for it cannot be denied that he has faithfully performed all the duties of a supercargo. Unless, therefore, he has, by some express agreement, made his reward to depend on the return of a particular cargo to *New-York*, he is fairly entitled to the stipulated compensation from his employers. If the owners are liable, the insurers are not. Are there any words in the agreement which import a precedent condition which is to be strictly performed? He is to be paid *out of any cargo to be brought from *Batavia*. It is not said that it must be brought to *New-York*. If the words of the contract do not clearly imply a condition precedent, the court will not give it such a construction. Further, he is to have a part of the cargo here, at his option. This option was created for his benefit.

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and ought not to be taken to his prejudice, or so as to destroy the rights vested in him by the other part of the contract.

Where a sum of money is to be paid, or a service to be performed, at a certain time, or at a particular place, these circumstances do not import conditions requiring a strict performance, but are *modal* only.† Having performed all the duties required of a supercargo,‡ the defendant in error became entitled to his commissions. The proceeds of the cargo sold at *St. Christopher's* were invested in other goods, which arrived at *New-York*, and were sold by the owners. Suppose the cargo, after its arrival at *New-York*, had been destroyed by fire; would the owners be allowed to say, we have been deprived of the *proceeds*, and, therefore, we are not bound to pay the commissions? This case ought to be considered, as if the defendant in error was now claiming of the owners, the sum agreed to be paid to him, as supercargo; for if he cannot recover of the owners, he must of the insurers.

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† 1 *Powell on Contracts*, 267, 268.

‡ *Beaver's Lex Mercat.* 48.

Radcliff, for the defendant in error. The matter in controversy lies within a very narrow compass. It depends on the fair construction of the contract. To understand the agreement, it is necessary to take into view the situation of the parties at the time it was made. The owners of the *Mary* and her cargo, finding it necessary to employ a supercargo, at a great expense, and being unable to insure beyond the value of the cargo, made their calculations as to the final result of an important and hazardous voyage, and determined that the payment of the commissions should depend upon its ultimate success. Such stipulations are not uncommon among merchants, where much property is put at risk, on a distant and precarious *adventure. The written contract sufficiently manifests this intention, and the supplementary agreement, as to the sale of the return cargo, without commissions, confirms this idea. The policy of insurance also is not in the usual form, on *commissions* generally; but it is made on the precise and specific contract in question. It is an entire compensation for an entire service. There can be no division, or *pro rata* compensation. The plaintiff must have the whole, or nothing. The insurers must have so understood the contract. The insurance was not for the faithful performance of the duties of a supercargo; but that, if he did perform those duties in the manner stipulated, he should be paid the sum agreed upon. The insurance is against all the risks and perils of the sea, which might prevent the safe arrival of the cargo. There can be no rational doubt, then, that the arrival of the cargo at *New-York* was to precede the payment. It was a precedent condition, and strictly to be fulfilled. The option given to the defendant in error could not be exercised, unless the goods arrived at *New-York*. This confirms the construction con-

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tended for, that the payment was to depend on the arrival of the proceeds here.

The insurance is for an entire premium *out and home*. But why insure the homeward voyage, if the defendant in error was entitled to his compensation after the performance of his duties at *Batavia*? This argument is conclusive that the voyage home, or the safe arrival of the cargo here, was the object of the parties.

But it is said that time and place are not of the *essence* of the contract, but *modal* only. The observation of *Powell*, however, is not to be understood to that extent. He means no more than that, where there is an antecedent debt, or where the debt is created by the contract itself, in which the place is appointed, the place of payment is mere circumstance.† But where the debt arises from services to be performed at a particular place, there the **place* is of the essence of the contract. It creates a condition precedent, and is to be strictly performed.

The case of a supposed loss by fire, subsequent to the arrival here, cannot apply. The question depends on general principles, and on the fair construction of the agreement made between the parties.

Harison, in reply. This cause is to be considered as if it were an action brought by the defendant in error against the owners. The contract ought to have a fair and liberal construction, so as to be carried into effect according to the intent of the parties. It is said, that the owners could not insure the commissions they were to pay to the supercargo, and therefore made them depend on the safe arrival of the proceeds here. But they insured the *profits*, and being thus secure of all the advantages of the speculation, they could well afford to pay the commissions. Considering the nature and extent of the voyage, the sum agreed to be paid to the defendant in error was not an extraordinary compensation.

It is not pretended that if the cargo perished altogether, the defendant in error was to be paid. The plain and fair understanding of the contract is, that if the *proceeds* of the cargo came into the hands of the owners, they were to pay the commissions. This is the only just and liberal construction to be given to the agreement, without adhering to the strict words. Suppose the ship had been cast away at *Sandy Hook*, and all the goods saved and sold in *New-Jersey*, or brought up to *New-York*, in lighters, and the *proceeds* received by the owners, would not the defendant in error have been entitled to his commissions? Might he not say, I sold your cargo in *Batavia*, I procured and put on board the return cargo, and have performed all the duties that were required of me? the *proceeds* have come into your hands, and I am, therefore, entitled to my reward? The loss was a technical total loss. The property might as well be sold at *St. Kitt's* as at *New-York*; the owners

† *Stiles*, 416.
Pinchard v.
Fowke, 1 *Str.*
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ought not, therefore, to get rid *of their contract, and throw the loss of commissions on the insurers. The supplementary agreement about the sale of the return cargo cannot affect the other contract, which is wholly independent. If, then, on a fair construction of the contract, the defendant in error be justly entitled to receive his commissions from the owners, the insurers cannot be liable, and the judgment of the Supreme Court ought to be reversed.

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THE CHANCELLOR. The legal construction of the contract, on which the existence of the interest insured depended, presents the only point in contest between the parties. It is, therefore, incumbent on the court, in the first instance, to discover its intent.

Matters extrinsic cannot be mixed in the exposition of written contracts, if the intent can be satisfactorily extracted from the terms in which they are conceived; unless mistake, or imposition, have distorted the meaning of the parties, which is not pretended in this case. It is not imposed as a duty on this court to supply omissions, which the inadvertence of the contractors has suffered to pass without attention, on conjectural grounds.

The contract in question is admitted to have been made at *New-York*. The compensation to the defendant in error is expressly said to be made in consideration of his undertaking and executing the duties of the *trust of supercargo*. The execution of that trust, which consisted in selling the outward bound, and purchasing and loading the homeward bound, cargo, was, in its locality, confined to *Batavia*; and those duties, it is found by the jury, were faithfully performed. Though this contract and the policy were made about the same time, the former being dated the 21st, and the latter the 27th of *February*, 1798, and the policy, in express terms, attached to the interest of the defendants in error, derived under the contract, no legal intendment arises from those circumstances, that the plaintiffs in error were privy to the ulterior views of the parties to it. They had nothing but the written contract, which was communicated to them, on which to estimate the risks they were to incur; and the same *construction which it was susceptible of at the moment of its consummation, must still be attached to it; for there is no *common* act of the original parties to the contract disclosed, which has varied its effects; and after it was made, it depended exclusively on the defendant in error, whether he would run his own risk, or protect himself against it by opening a policy.

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In no part of the contract is the port of delivery expressly mentioned; and it is not even designated by necessary implication, unless the election secured to the defendant in error to receive his compensation, on *his* arrival at *New-York*, at the current market price, and which is limited to *his* arrival, per-

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sonally, at *New-York*, and not to the arrival of the cargo, will establish that implication. If the word *bring* is taken in its usual acceptation, it refers merely to *Batavia*. There are no words connecting with it a progression to a particular port. It is the cargo brought *from Batavia, in the ship Mary*, the proceeds of which were to furnish the fund from which the defendant in error was to be compensated; but the port to which it was to be brought is omitted.

That the ship was destined to return to *New-York*, and, probably, with the cargo purchased at *Batavia*, I think will not vary the construction. It is no part of the contract; and the omission of so obvious a circumstance, and which must have so forcibly obtruded itself upon the minds of the parties, at the moment of making the contract, appears to me to aid the construction which my reflections upon the subject have led me to consider as the correct one.

The compensation was, in all events, to be made out of the proceeds of the cargo the *ship might bring from Batavia*; thus repelling all personal responsibility of the owners, and attaching it exclusively to the cargo. But the defendant in error had an option, on his arrival at *New-York*, to take that compensation specifically *out of the cargo*, at the current market price; thus limiting his election to *New-York*, as the place where it was to be exercised, which might affect the cargo, wherever it might be for a market. But this *election was, undoubtedly, intended to be beneficial to the defendant in error, and if he omitted to exercise it, the amount of the compensation remained undiminished. The same inexplicitness is observable in the memorandum*subjoined to the contract, and subscribed by *William and S. Robinson*. The *return cargo*, from *Batavia* or *Canton*, is mentioned, and they undertake the trouble of the management and sale of it, free from commissions. This management and sale might, however, be as well devolved upon them elsewhere as at *New-York*, as the defendant in error, one of the firm, accompanied the subject of the contract.

There is no circumstance disclosed, from which it can be reasonably inferred, that either party intended to put any part of the subject of the contract at hazard, *on the footing of a wager*. Whatever might be the extent of the sacrifice made by the defendant in error, as to probable emolument, in undertaking the voyage, the pursuit incurred some personal risk, and required a considerable proportion of his time, and it is certain that his services were intended to be actually exacted; and I think it as certain, judging from the common course of these kind of transactions, that he expected to have an equivalent secured to him. If so, the personal responsibility of the ship-owners being relinquished, and the subject of management being designated as the fund from whence compensation was to be made, the terms of the contract must be very clear to

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establish the position that the mere contingency of the return cargo, being placed at one or the other port, *in safety*, defeats that designation.

Here a construction is contended for, which would subject him to the effect of two several contingencies, either of which would defeat his right to compensation: the non-arrival of the cargo at *New-York*, and its arrival at that port in any other ship than the *Mary*. If this literal construction of the contract prevailed, though the owners received a profit equal to the ordinary course of the trade, he would lose his compensation; for the ship, with its cargo, might have been compelled to put into *Boston*, *Charleston*, or any other home port, which afforded a better market than *New-York*: *nay, for aught that appears, *St. Christopher's* may have afforded that better market. So the cargo might have been embarked on board of any other ship at *Batavia*, brought to the *New-York* market, and sold with every possible advantage at that port. In either of those cases, the defendant in error must have lost the whole benefit of the contract, and added its amount to the profits of the owners. There is no legal impediment to a contract of this kind, if the parties were disposed to make it; but the intent ought to be much more clearly expressed than it is in this instance, to establish so wide a departure from the ordinary modes of conducting business. It is possible that this may have been the intent; but every reflection of my mind has tended to a different conclusion.

There is no necessary connection between the exposition of this contract and the doctrine relative to insurances. The considerations respecting the policy, are wholly *ex post facto*; they can have no influence by relation. The policy might never have existed; its existence is not of the essence of the contract. It is a mere incident arising out of it; and matter subsequent, unless all parties concurred, could not vary it. The policy must attach to the contract, according to its legal construction, and that construction was indelibly stamped at the moment of its consummation.

This is an answer to the objection, that both the plaintiffs and the defendant have united in giving a construction to the contract, by the terms of the policy, in *attaching* it to a voyage at and from *New-York* to *Batavia*, with liberty to proceed to *Canton*, and from thence back to *New-York*; for the opening the policy was by the defendant in error, one only of the original contracting parties, without the intervention of the plaintiffs, whose concurrence was essential to vary its effect. But on this ground of construction I have some doubts; for it seems to me, that if the right of compensation had attached to the defendant at *Batavia*, the same reasons must have operated *to induce the defendant to make the insurance for its safe arrival at the place of his domicil.

These reasons induce me to think, that the defendant has a

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remedy for his compensation against the ship owners; and if so, he cannot resort to the plaintiffs in error for a total loss.

There are indications of an average, perhaps a total loss, but they are mere indications.

The sale of the ship and cargo is said to have been made by merchants at *St. Christopher's*, upon the usual commissions. It is possible that these commissions might have absorbed the whole, or a large portion of the defendant's allowance. If the sale was so made, in conformity to *local* regulations, which precluded the defendant from selling, it was a positive loss, covered by the policy. If it originated in personal convenience to himself, he had no right to recover, on that ground, as he had undertaken the management and the sale of the return cargo, by the terms of the contract, as one of the copartners of *William I. & S. Robinson*.

I am of opinion, that the judgment ought to be reversed.

WOODWORTH, Attorney General, was of the same opinion.

CLINTON, Senator. The only question to be decided, is whether, on a just construction of this contract, the defendant in error would be entitled to recover his commissions from the owners of the ship *Mary* and cargo. If the act to be done, or the services to be performed by the defendant in error, were to precede the payment of the stipulated compensation, he could not recover of the owners. I am inclined to consider the arrival of the return cargo, at *New-York*, in the nature of a precedent condition, and that the commissions were intended to be made dependent on that event. A number of merchants associate in a commercial enterprise, the scene of which was to be at a great distance, and the management of which required great prudence and discretion. To insure its success, *as far as human means could avail, they select one of their number to act as supercargo or agent, and they agree, that if the adventure should terminate successfully, to pay him an extraordinary compensation. If it failed, he was to receive nothing. But he might still secure the benefit of his contract, in case of any sinister event, by insuring the sum agreed to be paid as a reward for his services; thus the only loss he could sustain, would be the premium of insurance. The supercargo, accordingly, effects a policy of insurance on the amount of his commissions, out and home, against all the perils which could prevent the arrival of the return cargo to *New-York*. From this view of the case, the solution of the question is not difficult. If, by any accident, the return cargo did not reach *New-York*, the owners were not to pay, and the supercargo became entitled to recover of the insurers.

If the right to the commissions were to accrue upon the investment of the return cargo at *Batavia*, why was there any insurance on the voyage home? It was paying a further pre-

mium where there was no risk. Again, the payment was to be made out of the proceeds of any cargo the ship was to bring from *Batavia*, or the defendant might select a part of the return cargo, at his option. Here were no proceeds of any return cargo from *Batavia*, nor was there any such cargo, from which a part could be taken, at his election. The defendant in error has thus been deprived of his compensation by one of the perils insured against, and is, therefore, entitled to recover of the plaintiffs in error. My opinion, therefore, is, that the judgment of the Supreme Court ought to be affirmed.

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A majority of the senators concurring in this opinion, it was thereupon ORDERED and ADJUDGED, that the judgment given in the Supreme Court be affirmed, and that the record be remitted, &c.

Judgment affirmed.

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ABSENT AND ABSCONDING DEBTORS.

Under the act for giving relief against absent and absconding debtors, the creditor cannot maintain a suit at law, for his debt against the trustees appointed pursuant to the act, before the demand has been proved, or adjusted, and the dividend declared. The proper remedy is by petition to the equity powers of the court, under which the proceedings are instituted, who will either compel the trustees to do their duty, or advise them in cases of doubt or difficulty. The trustees under this act, may plead the statute of limitations in the same manner as the debtor himself could have done. *Peck v. The Trustees of Randall*, 165

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C. and D. claimed money in the hands of O. C. brought his action against O., who defended the suit at the request of D. The attorney of C entered into a compromise with the attorney of O. and D., and the suit

was discontinued; after which O. paid over the money remaining in his hands to D. C., finding some defect in the securities delivered to him as part of the conditions of the compromise, brought an action against O. for a breach of promise. It was held, that O. was a mere stakeholder, and the agreement of compromise must be considered as made between C. and D., and that O., having paid over the money, was no longer liable. *Carew v. Otis*, 418

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1. In a special action on the case against a bankrupt, who had received money prior to his bankruptcy, under a promise to put it out on bond and mortgage security, but neglected so to do, it was held, that he was not liable, even in that form of action, but that the demand was barred by the certificate. *Hatten v. Speyer*, 37
2. Two of three partners became bankrupts in *England*, and the other partner, residing in this state, was declared bankrupt under the law of the *United States*. An action of *assumpsit* was brought in the names of all the partners to recover a debt due before the bankruptcy. Whether the assignees of the bankrupt partner here ought to have been made parties to the suit? *Quere. Bird, Savage and Bird v. Pierpont*, 118

3. Whether the assignees of the bankrupt partners in *England* can sue here? *Quere.* *ib.*
4. Whether the bankruptcy of the plaintiffs can be given in evidence under the general issue? *Quere.* *ib.*
5. C. being in insolvent circumstances, on the 14th November, 1803, assigned over a bill of lading of goods at sea to I. in trust for M., a *bona fide* creditor, provided that in case M. sued him, then the property was to go to T., another creditor. On the 14th December following, C. became a bankrupt, and his assignees brought their action of *trover*, to recover the goods in the hands of I. It was held, that the assignment was a *voluntary* preference given to M. on the eve, and in contemplation of bankruptcy, and therefore void. *Ogden & Thomas, Assignees of W. & A. D. Cummings, Bankrupts, v. Jackson,* 370

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1. A bill was drawn and dated at *New-York*, on persons residing there, who accepted it. The drawers, in fact, resided at *Petersburgh*, in *Virginia*. The bill being protested for non-payment, the holder, on the same day, or the day after, put two letters in the post-office, giving notice of the protest to the *drawers*, one of which two letters was directed to *New-York*, the other to *Norfolk*, the supposed place of their residence. It was held, that, as it did not appear that the holder knew where the *drawers* lived, he had used due diligence, and that the notice was sufficient. *Chapman v. Lipscombe and Powell,* 294
2. If a negotiable note, or bill of exchange, is given for a simple contract debt, the party cannot recover on the original contract, unless he shows the note to be lost, or produces and cancels the note at the trial. *Holmes & Drake v. De Camp,* 34

3. A note made in *France*, but payable to a person in *New-York*, is valid, though not stamped according to the laws of *France*. *Randall v. Van Rensselaer,* 94
4. A promissory note in these words, "Due to the bearer hereof, 3*l.* 18*s.* 10*d.* which I promise to pay to A. or order, on demand," is not a note payable to bearer, but must be transferred by endorsement. *Cook v. Fellows,* 143

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CHAMPERTY AND MAINTENANCE.

In an action on the statute to prevent champerty and maintenance, &c., it was held, that where a deed of the grantor, conveying a *pretended title*, described generally all the right and title to the land in a particular patent, without specifying the precise quantity or bounds, and the grantor had a legal title to, and possession of a part, and a part was unoccupied, though another part of the same patent be in the actual possession of one who claims and holds adversely to the grantor, yet taking such a deed was not maintenance; especially where the purchase was made by the *bona fide* advice of counsel, and there are other circumstances to show that there was no intention to purchase a pretended title. *Van Dyck, qui tam, &c. v. Van Beuren & Vosburgh*, 345

CHARTER-PARTY.

A vessel was chartered on a voyage from *New-York* to *St. Lucia*, and back again, for the entire sum of 2,750 dollars, 1,800 dollars of which sum was to be paid on the delivery of the outward cargo, and the residue on the delivery of the homeward cargo. The vessel, on her return homeward, having performed about three fourths of her voyage, met with an accident, which induced the master and crew to abandon her. She was afterwards taken possession of by the crew of another vessel, and brought into *New-York*, where the vessel and cargo were libelled in the Admiralty Court for *salvage*, and were sold, and one half of the proceeds paid to the libellants for *salvage*, and the other half to the owners of the goods. In an action of covenant, brought on the *charter-party*, for the residue of the *freight money*, it was held, that this was not such a delivery of the cargo as would entitle the plaintiff to maintain an action on the *charter-party*. Whether any thing would be recovered in an action of *assumpsit*? *Quere. Post & Russel v. Robertson*, 24

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sociate more than two justices with him, as commissioners of excise, and the act of a majority of them present will be valid. *Orvis v. Thompson*, 500
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If goods be shipped *for the account and risk of the consignee, he paying the freight*, and it be so expressed in the bill of lading and invoice, a delivery to the carrier is considered as a delivery to the consignee, who alone can bring an action against the carrier, in case they are not delivered; the property being vested in the consignee by the bill of lading. *Potter v. Lansing*, 215

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meaning of the covenant. Persons so occupying the land have an interest in it, and are not mere laborers or servants to the lessee. *Jackson, ex dem. Colden and others, v. Brownell,* 267

2. In an action on a similar covenant, in another lease, where the quantity of land demised was 185 acres, it was held, that allowing one tenant, besides the lessee, to occupy the premises, was not a breach of the covenant. *Jackson, ex dem. Colden and others, v. Agan,* 273

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See ABSENT AND ABSCONDING DEBTORS.

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- * The term *northerly*, in a grant or deed, where there is no object mentioned to direct the inclination of the course towards the east or west, is construed to mean *due north*. *Brandt, ex dem. Wallon, v. Ogden,* 156
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- On a demurrer to evidence, the court will infer every fact which the jury could have done, had the cause been left to their decision on the evidence. *Patrick v. Hallett and Bowne,* 241

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- C. by his last will and testament, after charging his estate with the payment of a debt, providing for his wife, &c., devised his real and personal estate to his four sons and a daughter *Elizabeth*, and then added, *Further, my mind and will is, that if any of my said sons, William, Jacob, Thomas and John, or my daughter Mary, shall happen to die, without heirs male of their bodies, that then the lands shall return to the survivors, to be equally divided between them:* it was held, that these words did not create an *estate tail*, but a remainder over in fee to the survivors, on failure of the male heirs of the person first dying. *Fosdick and others v. Cornell,* 440

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- A citizen of this state married a wife in this state, and after living together for more than a year, the wife left her husband and went into the state of *Vermont*, and there obtained a divorce, under the laws of that state, on the ground of ill treatment and severe temper, and then returned to this state, where she has since resided. In an action brought by her against her husband, to recover the *alimony* adjudged to her by the decree of the court in *Vermont*, which granted the divorce, it was held, that the *domicil* of the wife was not changed by her going into *Vermont*, and residing there; that such conduct was an evasion of the laws of this state, which does not allow of a divorce except for adultery; and that no action could be maintained here on the decree of the court of *Vermont*. *Jackson v. Jackson,* 424

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- A husband devised certain articles of furniture and forty pounds in money to
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his wife, "in lieu and stead of every other claim or pretension to his estate." It was held, that this legacy or bequest did not bar the wife's right to dower at law. *Larrabee and Wife v. Van Alstyne*, 37

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1. A purchaser of lands from a vendee, who purchased under a *feri facias*, while there was a tenant in possession, may maintain an ejectment against such tenant, he being considered as a tenant at will to the purchaser. *Jackson, ex dem. Kane, v. Sternbergh*, note, 45
2. To maintain a title on a claim of *adverse possession*, such possession must be adverse at its first commencement, and *continue* so, uninterruptedly, for 20 years. *Brandt, ex dem. Walton, v. O. and D. Ogden*, 156
3. The deed of a person out of possession being void, does not preclude the grantor from bringing an action of ejectment to recover possession of the same premises. *Jackson, ex dem. Youngs and others, v. Vredenberg*, 159
4. Where A. entered on the land of B. with his permission, but without any reservation of rent, and continued in possession 18 years, and made improvements, it was held, that he was a tenant from year to year, and entitled to a notice to quit. *Jackson, ex dem. Livingston, v. Bryan*, 322

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4. A tenant may be a witness in an action of ejectment, when called to prove a fact against his interest. *Jackson, ex dem. Youngs and others, v. Vredenberg*, 159
5. Evidence of the declarations of a person, who has given a deed with warranty, though made in *articulo mortis*, cannot be received to support a title deduced from such person; but such declarations are evidence to show in what character, and with what intent, such person entered. *Id.*
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9. In an action by A. against B., on an implied warranty as to title in the sale of a horse, record of the judgment recovered against A. by the owner of the horse, may be given in evidence to the jury; notice of the former suit having been given by A. to B. that he might defend it. *Blasdale v. Babcock*, 517
10. A written order for insurance was laid before the insurers by the broker, who, at the same time, verbally communicated to them the facts said to be contained in the order; the broker was allowed to give evidence of his verbal communications without producing the order itself. *Livingston v. Delafield*, 522
11. Where the complainant in chancery, in his bill, inquired as to the consideration of a note, but asked nothing as to usury, and the defendant in his answer alleged usury, it was held, that the endorsement of the note was *prima facie* evidence of a full consideration, and that the answer

- of the defendant was not evidence of the usury, which must be proved. *Green v. Hart, in error*, 580
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The act for the inspection of flour intended for exportation, does not require that flour once inspected and shipped, and afterwards damaged by sea water, should be again inspected, before it is exported. *Griswold v. The New-York Ins. Co.* 205

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2. The common law of a foreign country may be proved by intelligent and respectable witnesses; but foreign statutes cannot be proved by *parol*. *Kenny v. Clarkson and Van Horne*, 385

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2. Judgment of conviction under the act for the forfeiture of estates, &c., is considered as the conviction; and where such judgment had been rendered in 1781, but the record not signed until July, 1783, the conviction was held to be good, and not within the provisions of the treaty between Great Britain and the United States. *Jackson, ex dem. The People, v. Snyder*, 520

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A mistake in a writ of inquiry, of the formal description of the court before which it is to be returned, is cured by the statute of jeofails. *Richardson v. Backus*, 50

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1. On an indictment for a nuisance, in keeping 50 barrels of gunpowder in a certain house near the dwelling-houses of divers good citizens of the state, and near a certain public street, &c., it was held, that the fact so charged did not amount to a nuisance; *aliter*, if it had been alleged to have been negligently and improvidently kept. *People v. Sands*, 78
2. In an indictment for forging a check drawn in the name of a copartnership, it is not necessary to set out the names of all the partners composing the copartnership, or banking company. *The People v. Curling*, 320

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1. A discharge under the insolvent act is conclusive as to the facts set forth in it, and cannot be avoided, except for the particular causes or frauds specified in the act. *Lester v. Thompson and White*, 308
2. H. executed a bond in a penal sum to C. and N., conditioned to procure, within six months, certain conveyances to be executed and recorded, so as to perfect the title to certain lands conveyed by H. to C. and N. Two years after the bond had become forfeited, H. became insolvent, and obtained his discharge under the insolvent act. In an action brought against him, afterwards, on the bond, it was held to be a debt provable under the act; and that, therefore, the insolvent was discharged from it. *Clinton and Norton v. Hart*, 375
3. A plea of a discharge under the insolvent act need not set forth specially all the proceedings previous to the certificate of discharge. It is sufficient if the discharge itself be set forth verbatim. *Service v. Heermance*, 91

INSURANCE.

1. Policy on goods from New-York to France, warranted American property. The goods were purchased in New-York, by American merchants, and shipped on board of an American vessel, consigned to merchants in France, under an agreement between them for that purpose, by which the former were to deliver the goods at St. Valery, in France, for which they 490

were to be allowed eight per cent. commission, taking on themselves all risks, expressly including a premium for sea risk, or insurance, as well as war risks; the consignees were to pay the freight on delivery, and also for the goods, in bills on London, guaranteed by a commercial house in London. During the voyage, the goods were captured by the British, and condemned as French property. In an action on the policy, it was held, that the goods remained the property of the consignors until their delivery in France, and that the warranty in the policy was complied with; that such a contract was legal and valid, and did not change the property so as to destroy its neutral character, or violate the contract of insurance. *D. and G. Ludlow v. Bourne and Eddy*, 1

2. Insurance on ten hogsheads of sugar from Antigua to New-York, warranted "free from any charge, damage or loss which may arise in consequence of seizure or detention, for or on account of any illicit or prohibited trade, or any trade in articles contraband of war." By a proclamation of the government of Antigua, sugars were allowed to be exported from that island in American vessels upon certain terms. The vessel arrived at Antigua the 4th of September, 1799, entered into the usual sugar bond, began to load the 12th September, but did not clear out until the 8th October. On the 4th September, an order had been issued revoking the permission before granted to export sugars, but was not delivered at the custom-house until the 10th. The vessel, however, was regularly cleared out, and on her voyage to New-York was captured by the French, and recaptured by the British, and carried into St. Kitt's, where vessel and cargo were ordered to be restored on payment of salvage; but the sugar was afterwards seized and condemned for a breach of the laws of trade. In an action on the policy, it was held, that, notwithstanding the vessel had been allowed regularly to clear out from Antigua, the exportation of the sugar was illicit, and so a breach of the warranty contained in the policy. *Tucker v. Juhel and De Longuemere*, 20
3. Insurance on cargo and freight, by an insurance company, and by twenty-three separate insurers on the ship. The ship was captured, and abandonments were made to the several insurers on ship, freight and cargo

respectively, which abandonments were accepted, and the sums insured paid as for a total loss. The ship and cargo were afterwards liberated, and the ship proceeded to the port of destination, and there delivered her cargo, which was there sold, and the net proceeds applied by the master, who was joint consignee with merchants there, to defray the expense of repairs, and for arming the ship. In an action brought by the insurers on the cargo, against one of the insurers on the ship, as part owner after the abandonment, for the net proceeds of the cargo, so taken and applied for the repairs of the ship, it was held, that after the abandonment and acceptance of the ship, the separate insurers were separately answerable, and not as joint partner with the others for his proportion of the net proceeds of the cargo applied to the repairs, but not for the arming or increasing the complement of men. *The United Insurance Company v. Scott and Seaman*, 106

4. Where the assured had written four letters by different conveyances, ordering insurance to be made, one of which letters was on board of the vessel in which the insured arrived, after a knowledge of the loss, at a port from which letters are sent by the mail, he is bound to communicate the news of the loss immediately, or by the same post, so that the assurance may be countermanded. *I. & S. Watson v. Delafield*, 150
5. Insurance on cargo, at and from New-York to a port or ports in the island of Cuba, and back. The policy contained the usual clause, that the insurer was not to be liable for the consequence of illicit trade, &c. The vessel arrived at *St. Jago de Cuba*, her port of destination, but was not allowed to enter; after waiting 20 days, she sailed for another port in the island, but was driven by adverse winds into the *Bite of Leogane*, and for fear of the brigand boats, she went into *Port Republican*, where the cargo was forcibly taken by the government there, and sold at a great loss. The insured abandoned as for a total loss, and assigned as a cause, the refusal of an entry at *St. Jago de Cuba*, and that the voyage had been thereby defeated. It was held, that the denial of entry at *St. Jago* was not a loss within the policy; but as to the effect of a denial to trade, if the voyage had ended there, *dubita-*
tur The insured, in making an

abandonment, must assign the true cause. If he assign an insufficient cause, he is bound by it, and cannot avail himself of a subsequent event, without a new abandonment. *Suydam and Wyckoff v. The Marine Insurance Company*, 181

6. A policy of insurance contained the following memorandum: "The vessel sails under a sea-letter without a register; property warranted American." It was held that parol evidence could not be received to explain what was meant by a sea-letter, as the nature of the document was settled by public treaties and acts of Congress. A sea-letter and a certificate of property are distinct documents, and sailing with a certificate of ownership is not a compliance with a warranty to sail with a sea-letter. *Sleight v. Rhineland and others*, 192
7. Where money is paid into court on a policy of insurance, under a rule for that purpose, the plaintiff, by taking it out, will not be precluded from proceeding for a total loss, when he informs the defendant's attorney, at the time, of his intention to proceed for a total loss. *ib.*
8. A vessel, in attempting to get out of the harbor, in order to proceed on her voyage, grounded, in consequence of which she became leaky; the cargo, consisting chiefly of flour, being damaged, was unladen. The ship was repaired in six days, at an expense of 150 dollars. Information was given to the insurers on the vessel and freight, of the accident, on the day after it happened, and a formal abandonment was made to them two days thereafter. The owners of the cargo received it of the owners of the vessel, and sold it at auction at a loss of about 27 per cent. It was held that the insured had no right to abandon; but ought to have insisted on carrying the cargo to the place of its destination, so as to entitle themselves to full freight. The assistance given by the insurers, in saving the property, on being informed of the accident, did not amount to an acceptance of the abandonment. *Griswold v. The New-York Insurance Company*, 205
9. M. chartered a vessel to A. and B. for a particular voyage, reserving half the cabin, and certain privileges for the master and mate, and covenanted to hire and pay the master and crew, and to furnish them with provisions, &c. The master, at the request of B., who was on board, went out of the

- course of the voyage, and the vessel was captured by a *Spanish* privateer. It was held that M., notwithstanding the charter-party, continued owner of the vessel for the voyage, and that the deviation amounted to an act of *barratry* in the master, for which the insurers on the vessel were liable. *M'Intire v. Bowne*, 229
10. If a vessel be *seaworthy* at the time of her sailing, and afterwards *suddenly spring a leak*, and founder, without any stress of weather or apparent cause, it is a loss by the perils of the sea, and the insurer will be liable. Whether the vessel be *seaworthy*, or not, is a fact which the jury are to determine. *Patrick v. Hallett & Bowne*, 241
11. If the port to which a vessel insured is destined be actually blockaded, the insured may abandon as for a total loss; the interdiction of commerce with the port of destination, by means of a blockade, is a peril within the policy. The going to another port, after being turned away, for the purpose of delivering the goods, was considered, after an abandonment, as done for the benefit of all concerned, and would not destroy the right of the insured to recover on the abandonment. *Schmidt v. The United Insurance Company*, 249
12. Insurance on a cargo of corn and flour from *New-York* to *Madeira*, with the usual memorandum in the policy. In her passage the vessel met with bad weather, and arriving in sight of *Madeira*, she was prevented by adverse winds from entering the port; and suspecting a ship in sight to be a privateer, the master bore away, and went to the *Cape de Verd Islands*, where the cargo, being found much damaged, was ordered to be sold by the government there. Not being able to repair the vessel, the insured broke up the voyage, and abandoned as for a total loss; but the vessel afterwards got some repairs, and went to *Lisbon*. It was held, that the going to the *Cape de Verd Islands* was not warranted by necessity, and therefore a *deviation*. *Nelson and others v. The Columbian Insurance Company*, 301
13. In making up of an account of loss on an open policy of insurance, the insured cannot charge a commission on the purchase of goods by themselves. *Anonymous*, 312
14. The jury have a discretion to allow interest or not on the amount of a partial loss on a policy. *Anonymous*, 315
15. If a policy of insurance contain the words, "on a voyage from *New-York* to *Barbadoes*, and a market," the insured, by the usage of the *West India* trade, has liberty to go, *bona fide*, from island to island in the *West Indies*, until he has sold the whole of his cargo; and he may sell a part of his cargo at one island, and a part at another. *Marxell v. Robinson and Hartshorne*, 333
16. To justify an abandonment in the case of *stranding*, the goods must be deteriorated to half their value. Where the accident of *stranding* happens at the mouth of a river or harbor, so that the insured might, by means of lighters, or other vessels, send the goods to the port of destination, he is bound to do so, and cannot sell them at auction, and abandon for a total loss. *Ludlow v. Columbian Insurance Company*, 335
17. K. purchased a *British* ship of merchants in *Jamaica*, but not being able to pay the whole purchase-money, it was agreed that the ship should continue in the names of the original owners until the balance was paid, when they were to give a regular bill of sale. K. took possession and acted as owner of the vessel. In an action on a policy of insurance on the vessel, effected in the name of K., it was held that he had an *insurable interest*. *Kenny v. Clarkson and Van Horne*, 385
18. The owner, notwithstanding there may be a *bottomry bond* on the vessel, may insure his interest generally; but the holder of the *bottomry bond* must insure *co nomine*. *ib.*
19. Where a vessel was valued at 2,000 dollars, and insured for that sum, and there was a prior insurance for 3,000 dollars, the insured was allowed to prove that the vessel was worth enough to cover both policies. *ib.*
20. If certain articles be enumerated in a policy of insurance, and a moiety of them be lost, the assured may abandon as for a total loss, though the loss be not equal to a moiety of the whole cargo. *Vandenheuvel v. The United Insurance Company*, 406
21. Where a vessel and cargo were captured, and the proceedings in the Admiralty Court were against the whole cargo, and part condemned, and the residue released, and to prevent an appeal and avoid further detention, the master agreed to pay

- a specific sum as a *ransom*, and sold a part of the cargo, being more than a moiety of the part insured, to defray the expenses and pay the ransom; it was held, that the sum paid for the expenses and ransom was not *general average*, but must be borne by the *cargo* alone, and that the insured was entitled to recover as for a total loss. *ib.*
22. Where a printed blank policy on *cargo* was used, and the blank filled up for an insurance *on profits*, and the *valuation* in writing, taken in connection with the printed words, was a valuation of the goods and not of the profits, it was held, that parol evidence was inadmissible to explain the intention of the parties, there being no ambiguity in the words as they stood. *Mumford v. Hallett*, 433
23. Every policy on profits must, of necessity, be a valued policy. *ib.*
24. Where the vessel and cargo were captured, and the owner of the goods abandoned them to the insurer, and also abandoned his interest to the insurers on the *profits*, it was held, that he was entitled to recover against the latter for a *total loss*, notwithstanding a previous abandonment of the goods to the insurers on the *cargo*, who received them after their release by the captors, and sold them to a profit. *ib.*
25. In effecting a policy of insurance, the broker stated to the insured that the vessel was *expected* to sail about the 1st of *October*. On the morning of the day on which the policy was subscribed, a vessel had arrived, bringing information that the vessel insured had sailed about the 3d of *October*, which information was not communicated to the insurer. After two verdicts for the plaintiff, the court refused to grant a new trial, on the ground of *concealment*, saying, that it was a question for the jury to determine whether the information was material or not. *Livingston v. Delafield*, 522
26. If a written order for insurance be laid before the underwriters by the broker, who, at the same time, communicates to them, verbally, what is said to have been contained in the written order, the broker may give evidence of his verbal communications, though the order is not produced. *ib.*
27. If property captured be abandoned, and the insurer accept the abandonment and pay the amount insured, and the agent or correspondent of the insured, without knowing of the insurance, purchase the property of the captors, for the benefit of the owners, and afterwards sell it, and invest the proceeds in goods, which he sends to the insured, the insurers may elect to consider the purchase, sale and investment, as done by their agent, and the goods in which the proceeds were invested as their property, and may maintain *trover* for it against the insured. *Robinson and Hartshorne v. The United Insurance Company, in error*, 592
28. The owners of a ship and cargo agreed with R., who was to go as supercargo on a voyage out and home, to pay him a gross sum for his commissions, out of the proceeds of the return cargo, or to give him out of it to the amount, at his election; in consideration of which, R. and his partner engaged to sell the return cargo, free of commissions. On her homeward voyage from *Batavia* to *New-York*, the vessel was compelled, by stress of weather, to put into *St. Kitt's*, where the cargo was sold from necessity, and a part of the proceeds were invested in other articles, the produce of the island, and brought to *New-York*. R., having effected a policy of insurance on his *commissions*, as stipulated in his contract with the owners, on their refusal to pay him, abandoned to the insurers, and brought his action against them for a total loss: and it was held, that as the return cargo did not arrive at *New-York*, R. lost his commissions, and was, therefore, entitled to recover the amount of the insurers. *The New-York Insurance Company v. William I. Robinson, in error*, 615
- See AMENDMENT, 2. PRACTICE, 10. EVIDENCE, 10.
- INTEREST.
1. Interest is not recoverable for arrear of rent payable in wheat. *Executors of Van Rensselaer v. Administrators of Platner*, 276
 2. Interest may be allowed on a partial loss on a policy. It is not allowable on unliquidated damages, or uncertain demands. *Anonymous*, 315
 3. Where damages are assessed by a jury on a bond penal, to the full amount of the penalty, and judgment

has not been delayed by the defendant, no interest is allowed. In all cases, in which the cause of action is such as to carry interest, if the proceedings be stayed after a verdict, on application of the defendant, interest is allowable for the time the judgment is delayed. *The People v. Gaine*, 343

4. The jury have a discretion to allow interest, or not, on the amount of a partial loss on a policy of insurance. *Anonymous*, 312

JOINT-OWNER.

One joint-owner of a chattel may bring trover or trespass for his share or interest, and the defendant cannot, at the trial, take advantage of the others not being joined; but must plead it in abatement. *Wheelwright v. Depeyster*, 471

JUDGMENT.

1. This court will not order a judgment to be signed *nunc pro tunc*, in order to give effect to a conviction under the act creating forfeitures, &c. *Seaman v. Miller*, 148
2. E. gave a bond and warrant of attorney to W., who entered up judgment thereon against E. in the Supreme Court. W. assigned the judgment to O. to secure the payment of a debt. O. assigned it to R., who again assigned it to N. E. having paid the whole, or nearly the whole of the judgment to W., he acknowledged satisfaction. The day after the satisfaction was acknowledged, B., finding the judgment against E. regularly satisfied on record, lent him a sum of money, and took a bond and warrant of attorney, on which he entered up judgment against E. in the same court. N. afterwards applied to the court to have the satisfaction acknowledged by W. on the first judgment vacated on the ground of fraud: and the court ordered the satisfaction to be vacated, and the judgment restored: N. thereupon took out a *feri facias* on that judgment, and levied on the estate of E. B. filed his bill in chancery for relief, and to obtain a restitution of the money levied on the execution. On an appeal from the interlocutory order of the chancellor, it was held, that

E. having paid to W. the amount of the first judgment, before notice of the assignment, and the same having been satisfied on record, at the time the second judgment was entered up, the latter was entitled to priority, notwithstanding the *vacatur* of the satisfaction entered on the first, there appearing to be no knowledge or privity on the part of B. to any fraud in obtaining the satisfaction of the first. The money levied on the judgment in favor of N. was ordered to be paid to B. *Bebet and others v. The Bank of New-York*, in error, 529

3. On an appeal from an interlocutory order of the Court of Chancery, the Court of Errors will give judgment on the merits, if brought before them. 45

See SET-OFF, 1.

JUROR.

It is a good cause of challenge to a juror that he has previously given his opinion on the question in controversy between the parties. *Blake v. Millsbaugh*, 316

JUSTICE'S COURT.

1. In an action before a justice of the peace, under the act for the more speedy recovery of debts to the value of 25 dollars, every demand arising on contract may be set off. *M'Cumber v. Goodrich*, 56
2. The mere inspection by the justice, of a note presented to him by the plaintiff, is not such a commencement of the trial of a cause, as to preclude the party from demanding a trial by jury. *Olney v. Bacon*, 142
3. If a defendant neglect to appear, he cannot, afterwards, in error, on *certiorari*, take advantage of a variance between the declaration and process. Want of averment in a declaration will, after judgment, be intended to have been supplied by proof. *Owens v. Morehouse*, 276
4. In an action before a justice of the peace, it is a good plea in bar that the defendant had previously commenced an action against the plaintiff before another justice, in which the plaintiff ought, but neglected, to

- set off his demand. *Douglas v. Hoag*, 283
5. If a justice overrule an objection to a juror, and the party goes to trial on the merits, it is no waiver of the exception, nor does it preclude him from taking advantage of it in error. *Blake v. Millsponagh*, 316
 6. In all suits under the 25 dollar act, before a justice, costs are given of course where a debt or damages are recovered. *ib.*
 7. A constable of the county may serve process under the 25 dollar act in any part of the county. *Mills v. Kennedy*, 502
 8. Where some evidence is offered before a justice, the court will not reverse his judgment because it was too light or insufficient to support his judgment. *Fisher v. Chandler*, 505
 9. Actions for penalties, under the act *to regulate highways*, must be brought in the name of the person who makes the complaint, and be prosecuted according to the 25 dollar act, and not in a summary way. *Rue v. Sprague and Consaulis*, 510
 10. If an attorney of the defendant offer to make affidavit of the absence of a material witness, and request the adjournment of a cause before a justice, such affidavit ought to be received, unless some special cause to the contrary be shown. *Sears v. Grandy*, 514
 11. If the justice, before whom a cause is tried, be sworn as a witness though the oath be administered by another justice, it is error. *Perry v. Veyman*, 520

K.

KAYADEROSSERAS PATENT.

Baker's falls are the third falls in the Hudson River, mentioned in the *Kayaderosseras* patent. The commissioners, in the partition of that patent, in 1770, took the true north-west-most head of the *Kayaderosseras*, and it is rightly laid down on their map. The term *northerty*, in this patent, means *due north*. *Brandt, ex dem. Walton, v. O. and D. Ogden*, 156

L.

LANDLORD AND TENANT.

Where A. entered on the land of B., with his permission, but without any reservation of rent, and continued in possession 18 years, and made improvements, it was held, that he was a tenant from year to year, and entitled to a notice to quit. *Jackson, ex dem. Livingston, v. Bryan*, 323

LEASE.

See COVENANT, 1, 2.

LIBEL.

1. In an action for a libel, can the defendant give in evidence, under the general issue, the general character of the plaintiff, in mitigation of damages? *Quere. Foot v. Tracy*, 46
2. In an action for a libel, the defendant may give in evidence a former publication of the plaintiff, to which the libel was an answer, in order to explain the subject matter, occasion and intent of the defendant's publication, and in mitigation of damages. But such prior publication by the plaintiff, though a libel on the defendant, does not amount to a justification of the defendant's libel, nor will it be received in evidence as such. *Hutchins v. Lothrop*, 286

See STRUCK JURY, 1.

LIMITATIONS, STATUTE OF

When the statute of limitations once begins to run, it continues to run, notwithstanding a subsequent disability. *Peck v. Trustees of Rundall*, 286

M.

MANDAMUS

See PRACTICE, 5.
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MARKET-OVERT.

See SALE, 5.

MASTER OF A SHIP.

1. One vessel run foul of another vessel lying at anchor, and did her damage. The vessel that did the injury was sailing out of the harbor, with a pilot on board, and the master was on shore at the time of the accident. In an action by the owner of the damaged vessel against the master of the other vessel, it was held, that he was not liable. *Snell, Staggs & Co. v. Rich*, 305

A master of a ship signed bills of lading for a quantity of cochineal, shipped at *New-Orleans*, to be delivered to C., at *New-York*, one of which bills he kept, accompanied with the customary proofs of neutral property, without which he refused to take the goods. There were thirty other different shippers of goods on board the same vessel. During the voyage, the vessel was captured, and the captors took away all the papers relative to the ship and cargo, which was libelled as *Spanish* property. The master put in a claim in behalf of the owners of the cargo, and in his answer to the interrogatories in the admiralty court, he denied that he had signed any bill of lading for the cochineal, but said it belonged to P., a passenger on board, who had gone to *New-York*; yet he gave a particular account of all the owners and consignees of the other goods, all of which were *acquitted* or detained only for further proof. The cochineal only was condemned. In an action against the master for his negligence and misconduct, in not protecting the cochineal, but giving a false account of it, it was held, that he was not answerable, for it might be that he had forgotten that he had signed a bill of lading, and his answers did not justify the condemnation, nor could they be said to have occasioned the loss; and there was no evidence of fraud or intentional neglect. *Cheviot v. Brooks*, 364

See PILOT.

MORTGAGE.

Where a mortgage was given to secure a note payable to order, and the

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holder endorsed the note over, and at the same time delivered the mortgage to the endorser, but made no assignment of it in writing, it was held, that the transfer of the note being in writing, the mere delivery of the mortgage security was a sufficient assignment. The debt is the principal, the security is the incident. The assignment of the debt draws after it the incident. *Green v. Hart*, in error, 580

N.

NEW-YORK CITIZENS.

Such of the inhabitants of the city of *New-York* as are not members of the corporation, nor made free of the city, in the manner prescribed by the charter, are not exempted from serving on juries out of the city. That exemption extends only to the mayor aldermen, commonalty and freemen or persons made free of the city. *Cortelyou v. Van Brunt*, 313

NEUTRAL PROPERTY.

The neutral character of property, how affected by a contract for its sale and delivery between a neutral and a belligerent. *Ludlow v. Bowne & Eddy*, 1

See INSURANCE, 1.

NUISANCE.

On an indictment for a nuisance in keeping 50 barrels of gunpowder in a certain house, near the dwelling-houses of divers good citizens of the state, and near a certain public street, &c., it was held, that the fact so charged does not amount to a nuisance. *Ailer*, if it had been alleged to have been negligently and improvidently kept. *The People v. C. and J. Sands*, 78

O.

ORDER OF JUSTICES.

A previous order of a justice is not necessary where security is given by bond

for the maintenance of a bastard child, or helpless pauper; but only in case of the voluntary application of the pauper himself for relief. *Falls and Smith, Overseers, &c., v. Belknap*, 486

ORDER OF REMOVAL.

See REMOVAL, ORDER OF.

P.

PARTNERS, OR JOINT-OWNERS.

See INSURANCE, 3. JOINT-OWNER.

PARTNERSHIP.

Where one of several partners dies, and the survivors continue to trade under the copartnership name, and an account is stated afterwards by a debtor, between him and the copartnership, admitting a balance due by him for goods sold in the life-time of the deceased partner; the surviving partner may recover such balance on an *insimul computassent*, without stating the death of the other partner and the survivorship. The stating of the account is in the nature of a new promise to the survivors. *Holmes & Drake v. D'Camp*. 34

See BANKRUPT, 2.

PARTITION.

The general guardian appointed by the surrogate is not sufficient, but a guardian for the infants must be appointed by the court under the act. *In the matter of Stratton and others*, 509

PILOT.

A pilot, while on board of a ship, has the exclusive direction and control of her, and is considered as master, *pro hac vice*. *Snell, Stagg & Co. v. Rich*, 305
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PLEADINGS.

1. A person tried and convicted on an indictment, and afterwards discharged, because a juror was improperly withdrawn, was again tried on a second indictment, for the same offence, and pleaded *autrefois acquit*; and it was held that, as the first indictment was erroneous, the plea of *former acquital* was no bar to the second indictment. *The People v. Barrett and Ward*, 66
2. A plea of discharge under the *insolvent act* need not set forth, specially, all the proceedings previous to the certificate of discharge. It is sufficient, if the discharge itself be set forth *verbatim*. Where new matter is alleged in a plea, it must conclude with a *verification*. *Service v. Heermance*, 91
3. In an action for a *deceit* in the sale of a newspaper establishment, it was held that the declaration must expressly allege that the defendant made the affirmation *falsely, fraudulently or knowingly*; the want of these words will not be supplied by the concluding part of the count, and so by reason of the said affirmation the plaintiff was *falsely and fraudulently deceived*, &c. *Bayard v. Malcolm and Malcolm*, 458
4. The want of an allegation of *fraud* or a *scienter* is not helped by a *verdict*. *ib.*
5. A count on a *deceit* in a sale cannot be joined with a money count; being *torit and assumptit*, they require different pleas. *Wilson v. Marsh*, 503
6. *Quere*, whether *nil debet* to an action of debt on a judgment, be such a general issue as to entitle the defendant to give special matter in evidence, pursuant to a notice for that purpose; *Meyer v. M'Lean*. 509
7. The declaration stated that the defendant did not take care to fill, stop up, or cover a certain vault or hole, dug by him in the street, nor to place a fence to prevent, &c., whereby, &c. The defendant pleaded that he did place, &c. The replication was the words of the declaration, and concluded with a *verification*, and it was held to be bad, and that the plaintiff ought to have taken issue on the plea. *Bindon v. Robinson*, 516
8. If, in a suit on a bail-bond, the suit, court, and place of the defendant's appearance, are substantially set forth in the plaintiff's declaration, it is sufficient. *Stevens & Waters v. Clancy, &c.* 521

- 9 In an action against a person for practising physic contrary to the act, it is incumbent on the defendant to show himself within some of the provisos; the plaintiff need not negative them in his declaration. *Sheldon v. Clark*, 513

See PARTNERSHIP, 1. REPLEVIN, 1. PRACTICE, 29.

POSTMASTER.

No action will lie against the executors or administrators of a postmaster for bank notes stolen by one of the clerks of the postmaster, out of a letter delivered at the post-office. *Quere*, whether the action could have been maintained against the postmaster himself, had he been living? *Franklin v. Low and Swartwout, Administrators of Bauman*, 396

PRACTICE.

1. On an application to set aside a writ of inquiry, and subsequent proceedings, in an action of slander, on the ground that the defendant had since discovered new evidence, amounting to a justification, the affidavit ought to state the names of the witnesses, and what the party expects to prove by them. *Richardson v. Backus*, 59
2. Where no attorney is employed by a defendant in error, on *certiorari*, the notice of the rule to join in error, must be served on the defendant, personally. *Hardenbergh v. Thompson*, 61
3. Where one of two defendants is taken on a *cap. ad respond.* and judgment is entered and execution issued against both, the execution will not be set aside for irregularity, if it appear that only the defendant originally arrested is taken on the *ca. sa.* *Bailou, Assignee, &c., v. I. & A. Hulbert*, 62
4. When the argument of a case is about to be opened, the opening counsel must furnish the opposite side with the points he intends to rely on, in support of his motion. *Schmidt v. United Insurance Company*, 63
5. Where an *alternative mandamus* has been duly and regularly served, the court will issue a *peremptory mandamus*, without compelling a return to the first writ. *The People, ex relat. Tremper, v. Judges and Supervisors of Ulster*, 64
6. In *trover*, the court will not order articles which have been tendered to the plaintiff and refused, to be struck out of the declaration. *Shotwell v. Wendover*, 65
7. Motion to set aside the report of referees must be made at the next term after they have made their report. *Comstock v. Rathbone*, 138
8. The insolvency of the defendant is a sufficient excuse for not proceeding to trial, pursuant to a notice, and the plaintiff may discontinue without costs. *Hart v. Storey*, 143
9. The words "as soon thereafter as counsel can be heard," usually inserted in notices of arguments, are unnecessary. *Anonymous*, 143
10. After plea pleaded, leave was granted to pay money into court, with costs, to the time, but not specifically as the premium on the policy of insurance on which the action was brought. *Dunlap & Grant v. Columbian Insurance Company*, 149
11. Where a bill of exceptions, or a special verdict is taken, and a case is also made, the party must make his election to proceed on one or the other, and will not be allowed to argue both. *Sleight v. Rhinelanders*, 192
12. On an appeal from the opinion of a judge refusing a certificate to stay proceedings in a cause after verdict, the party appealing may deliver to the court the points and authorities on which he relies, together with the case. *Anonymous*, 275
13. Where a certificate to stay proceedings in a cause is obtained, it amounts to an enlargement of the four day rule nisi, and a motion in arrest of judgment may be made at any time or term subsequent, and before the judgment is entered up and perfected. *Bayard v. Malcolm*, 310
14. On a motion to set aside an inquest taken on a default, on an affidavit of merits, counter-affidavits are not received. *Anonymous*, 313
15. Either party may give notice of bringing on the argument of a case; and if the cases are not ready to be delivered by the party whose right it is to make them up, when the cause is moved by the opposite party, he may have judgment by default. *Malcolm ads. Bayara*, 316
16. In an action of dower, *unde nihil habet*, the tenant must appear and plead on the *quarto die post* of the term

- in which the summons is returnable, otherwise his default may be entered. Plea of *non-summons* must be verified by affidavit, and be put in on the *quarto die post*. *St. Croix v. Sands*, 328
17. A party is not bound to produce a paper unless the opposite party has given him notice to that purpose. *Waring v. Warren*, 340
 18. A defendant is not entitled to judgment as in case of nonsuit, for not proceeding to trial, in the *city of New-York*, if it appear that the cause could not have been tried in its order on the calendar, had it been noticed for trial. *Currie v. Moore*, 492
 19. After an assignment of errors, it is too late to move for an amendment to a *certiorari*. *Rue v. Sprague & Consaulis*, 493
 20. Bail in error may be put in before a judge at his chambers, and it will be considered as taking effect from the judgment. *Richardson v. Backus*, 493
 21. It is sufficient if the penalty be to the amount of the judgment. The bail cannot gainsay their recognition. *ib.*
 22. Notice of bail need not state before whom it is taken. *ib.*
 23. A writ of error may be brought before judgment is entered up. *ib.*
 24. If one count in a declaration for slander be bad, and the other counts be good, and a general verdict be found for the plaintiff, and the judge, before whom the cause was tried, certifies that the evidence did not particularly apply to the bad count, judgment may be entered up on the good counts, on payment of costs. *Stafford v. Greene*, 505
 25. If the defendant, after verdict, tender the amount recovered, with costs, up to the time, the court will order further proceedings to be stayed. *Hatfield v. Brown*, 506
 26. An agreement to put off the trial of a cause, made between the counsel of the parties, must be in writing, otherwise, the court will grant a rule for judgment, as in case of a nonsuit for not proceeding to trial. *Griswold v. Lawrence*, 507
 27. The rule for an attachment against a sheriff, twenty days after service of the former rule, applies only to cases of writs, and not to the bringing in of the body of the defendant. *Franklin v. Lamb*, 508
 28. Service of a notice of a rule for the assignment of errors, must either be personally, or good reason be shown why it is not, and that it has been left at the last usual place of abode of the party, if he has removed from the county. *Graves v. Miller*, 509
 29. If the plaintiff consent to go to trial on a bad plea, he cannot afterwards set aside the verdict, because the judge admitted evidence under it, not authorized by the plea. *Meyer v. M'Lean*, 509
 30. In a suit brought by A. against B., on an implied warranty as to the title of a horse sold to him by B., it appeared that A. gave notice to B. of a suit brought against him by the real owner of the horse, and B. attended at one court, but A. did not give another notice of the time of trial; the first notice was held sufficient to entitle A. to give in evidence the record of recovery against him by the owner of the horse. *Basdale v. Babcock*, 517

PRIZE AND PRIZE COURTS.

1. Belligerents cannot establish prize courts in a neutral country; nor can they make any sale of their prizes there, unless authorized by treaty. *Wheelwright v. Depeyster*, 471
2. The property in goods captured cannot be transferred, so as to divest the right of the original owner, unless after a sentence of condemnation by a court of competent jurisdiction. *ib.*
3. The court of the sovereign of the captor is the competent tribunal to decide on the validity of captures. *ib.*
4. Prize courts proceed *in rem*, and cannot adjudicate on a prize lying in a foreign port, or out of the jurisdiction of the captor, or his ally. *ib.*
5. Courts of *common law*, though they cannot inquire into the direct question of *prize*, may, in a question of property, decide, whether the condemnation or sale has been made by a court of competent authority. *ib.*

R.

RECAPTURE.

See *SALVAGE*.
499

REFEREES AND REFERENCE.

1. Where referees in a cause are chosen by consent of parties, and without a rule of court, the court will not listen to any application to set aside the report. *Miller and Underhill v. Vaughan*, 315
2. If parties voluntarily submit their cause to referees, the court will not interfere to set aside the report, even on an affidavit of merits. *Stevenson v. Beecker, Survivor, &c.* 492

See PRACTICE, 7.

REMOVAL, ORDER OF.

1. Two justices of the peace may order the removal of a pauper, on information obtained from any source. If the order states that the pauper is likely to become chargeable; that the justices cannot discover the place of legal settlement, and that such pauper came last from the town of S—, this is sufficient, without a more formal or precise adjudication of facts. *Overseers of Shawangunk v. Overseers of Mamakating*, 54
2. If the order of removal of a pauper contains no evidence of, or adjudication, that the pauper had a settlement in, or last came from the town to which he is ordered to be removed, it will be quashed. The sessions may allow costs on appeals to them on such orders. *Overseers of Newburgh v. Overseers of Plattekill*, 330

REPLEVIN.

1. In replevin, the *avowant* must set forth his title, and allege the estate of which he is seised, or the *avowry* is bad. *Harrison v. McIntosh*, 380
2. Property, in a stranger, is a good plea in bar or abatement, and entitles the party to a return without an *avowry*; and a replication to such a plea, that the defendant entered the house in the *night time*, is bad. *ib.*
3. If the replication states that the goods were delivered to the plaintiff by B. for safe keeping, and that the plaintiff has a *special property* in them, or authority to make the deposit, such replication is bad. *ib.*

500

S.

SALE OF CHATTELS.

1. In an action of *assumpsit* on the sale of goods, for not delivering goods of a certain description, but of a different sort and quality, either an express warranty or fraud must be alleged, and the plaintiff must prove the allegations as laid in the declaration. *Snell, Stagg & Co. v. I. Moses & Sons*, 97
2. In *assumpsit* for a fraud in the sale of goods, the declaration should contain either an express warranty, or an averment that the vendor *knew* of the bad quality of the articles, at the time of sale; and the proofs must correspond with the allegations in the declaration. *Perry v. Aaron*, 129
3. In every sale of a personal chattel, there is an *implied warranty* as to the title of the vendor. *Aliter*, as to the quality or soundness of the thing sold. *Defreeze v. Trumper*, 274
4. Where the parties in the sale of a ship reduced their contract to writing by a *bill of sale*, it was held, that no action would lie on a *parol warranty* made at the time of the sale, and where no fraud was alleged. *Mumford v. M'Pherson*, 414
5. The *English law* as to sales in *market-overt* is not applicable here. *Wheehoright v. Depeyster*, 471
6. Where the contract of sale is reduced to writing, you cannot maintain an action on an implied warranty, but only for a *deceit*. *Wilson v. Marsh*, 503

See VENDOR AND VENDEE, 3, 4. PLEADINGS, 5.

SALVAGE.

No salvage is due for a rescue or recapture by a neutral, from a friendly power. *Peck v. Trustees of Randall*, 165

SEA-LETTER.

See INSURANCE, 6.

SETTLEMENT.

1. The question of settlement cannot be tried in an action, brought on a

bond given to indemnify a town for the support of a bastard child; and the party is stopped by his bond from alleging that the place of settlement was in another town. *Falls and Smith, Overseers, &c., v. Belknap*, 486

- 2 The surety of such indemnity bond given to save harmless the town, from time to time thereafter, is holden, after the child has arrived at the age of 21 years, and as long as it shall continue chargeable. *ib.*

See REMOVAL, ORDER OF, 1, 2.

SET-OFF.

1. Where a judgment of reversal had been obtained in this court of a judgment in the Court of Common Pleas, and a restitution awarded, and afterwards a second judgment was obtained in favor of the plaintiff, in a new action between the same parties, for the same cause, in the Court of Common Pleas, this court would not allow the judgment of reversal in this court, to be *set-off* against the second judgment in the Common Pleas; considering the latter court as having power to make it. *Brewerton v. Harris and Harris*, 144
2. In an action by an *endorsee* of a promissory note against the maker, the latter will not be allowed to prove a *set-off* against the original payee, unless he previously show that the note was transferred after it became due, or for the purpose of defrauding the maker of his *set-off*. *Hendricks v. Judah*, 319

See JUSTICE'S COURT, 1.

SHERIFF.

- In an action for an escape and false return on *mesne process* against a sheriff, the plaintiff can recover no more damages than he might have done in the original action; nor ought he to recover more than he has actually lost by the escape. *Potter v. Lansing*, 215

SLAVE.

See WITNESS, 4.

SPECIAL VERDICT.

See AMENDMENT, 1. VENIRE DE NOVO.
1. PRACTICE, 11.

STAMPS.

The courts of this state do not take notice of the laws of a foreign country in regard to stamps or matters of revenue. *Randall v. Rensselaer*, 95

STRUCK JURY.

1. Where a public officer sues for a libel in relation to a trust held *ex officio*, a struck jury may be allowed. *Livingston v. Cheetham*, 61
2. A struck jury was refused, on an affidavit that a suit was on a policy of insurance, and involved questions of intricacy and importance. *Anonymous*, 314

SUPERVISOR.

See COMMISSIONERS OF EXCISE, 1, 2.
TAVERN LICENSES.

SURETY.

See ADMINISTRATION BOND, 1.

SURVEY OF LANDS.

A mistake of a deputy-surveyor, under the surveyor-general, not appointed by the parties, in running the boundary lines of certain lots in the township of *Aurelius*, was allowed to be rectified so as to give to each party the quantity corresponding with their respective patents, and the map of the township on file in the office of the secretary of state. *Jackson, ex dem. Crossett and others, v. Hunter*, 495

T.

TAVERN LICENSES.

If three, or a majority of the commissioners of excise present, sign a
501

license to keep a tavern, &c., it is sufficient, though the supervisor refuse to sign it; for it is not indispensable that he should sign the license. *Orvis v. Thompson, qui tam, &c.* 500

TENDER.

See TROVER, 1. PRACTICE, 25.

TRESPASS, AND TRESPASS QUARE CLAUSUM FREGIT.

1. A purchaser of real estate under a *feri facias*, may enter and take possession of the premises in a peaceable manner, though some goods of the former proprietor be left on the premises, and though they may be occasionally occupied by his servants. *M'Dougall v. Silcher and another*, 42
2. In an action of trespass against a collector of the customs for seizing and detaining the plaintiff's vessel, for a pretended breach of the laws of the *United States*, relative to the registering of ships, the vessel having been restored, it was held, that the difference between the price at which the vessel would have sold, at the time of seizure, and the price she actually sold for at public auction, immediately after her restoration, together with the actual expenses incurred, with interest on the amount, constituted a just and proper measure of damage as assessed by a jury. *Woodham v. Gelston*, 134
3. In trespass *quare clausum fregit*, the defendant pleaded in justification, a right of way over the land of the plaintiff, and a verdict was found for the plaintiff for six cents damages; and it was held, that the plaintiff was entitled to full costs under the statute. The certificate of the judge need not be given *at the trial*: it is sufficient if it be given afterwards, and even after the clerk has taxed the costs. *Heaton v. Ferris & Ferris*, 146
4. If separate suits be brought against several defendants for a joint trespass, the plaintiff may recover separately against each, but he can have but one satisfaction; and he may elect *de melioribus damnis*, and issue his execution against one of the defendants; and the others must pay 502

the costs of the suits against them respectively. *Livingston v. Bishop and others*, 290

5. A lessor cannot maintain trespass *quare clausum fregit* against a stranger, for cutting down and carrying away trees, while there is a tenant in possession. The action can only be brought by the tenant in actual possession. *Campbell v. Arnold*, 511

TROVER.

1. Machines and tools of a man's trade are not allowed to be brought into court in an action of trover. *Shotwell v. Wendover*, 65
2. One joint owner of a chattel may bring trover or trespass for his share or interest, and the defendant cannot at the trial take advantage of the other's not being joined, but should plead it in abatement. *Wheelwright v. Depeyster*, 471

See TROVER, 6. INSURANCE, 27.

U.

USURY.

See EVIDENCE, 11.

V.

VENDOR AND VENDEE.

1. A vendee of real estate under a *feri facias*, may enter and take possession of the premises peaceably. *M'Dougall v. Silcher*, 42
2. A purchaser of lands of a vendee, who purchased under a *feri facias*, may maintain ejectment against the tenant in possession. *Note*, 45
3. Some coffee belonging to *American* citizens had been captured by a *French* privateer, and carried into *St. Jago de Cuba*, and there sold

provisionally, by the order of a French agency established there, and afterwards condemned by a court of admiralty at *St. Domingo*, upon a *proces verbal*, and proceedings at *St. Jago*: the goods having been purchased, *bona fide*, by American citizens, of Spanish merchants at *St. Jago*, and brought to *New-York*, the original owner brought an action of trover to recover them, and it was held that such a sale did not divest him of his property, but that he might recover it of the vendee. *Wheelwright v. Depeyster*, 471

4. A *bona fide* purchase of goods, without notice or reference to the title of the vendor, does not, of itself, give an indefeasible title to the vendee. *ib.*

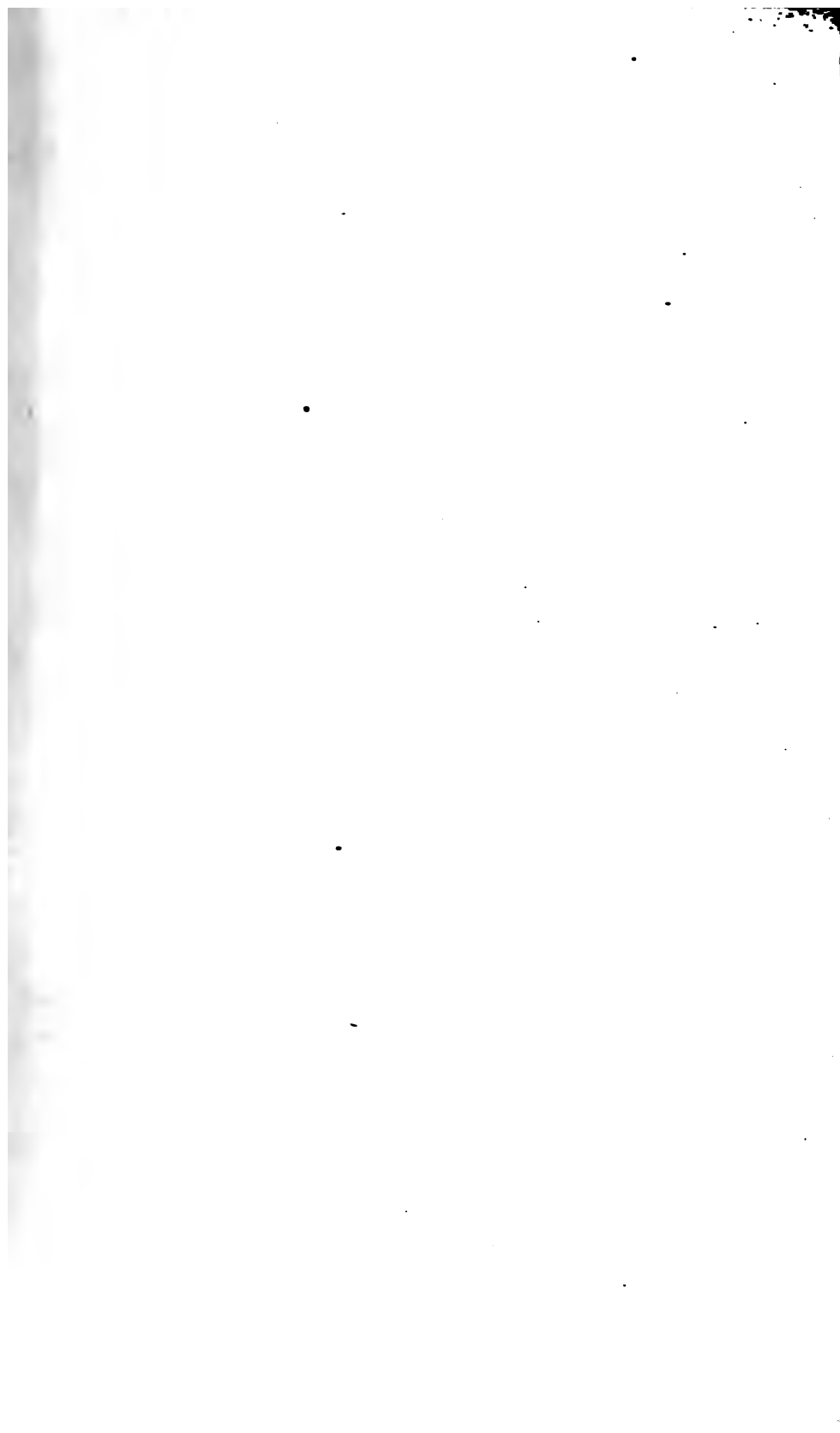
VENIRE DE NOVO.

Where a fact is not controverted at the trial of a cause, nor litigated before the jury, and the counsel omitted to have it inserted in the special verdict at the time, supposing it might be added afterwards, the court will order a *venire de novo*, to ascertain such fact, unless the opposite party will consent to amend the special verdict by inserting it. *I. & S. Watson v. Delafield*, 150

W.

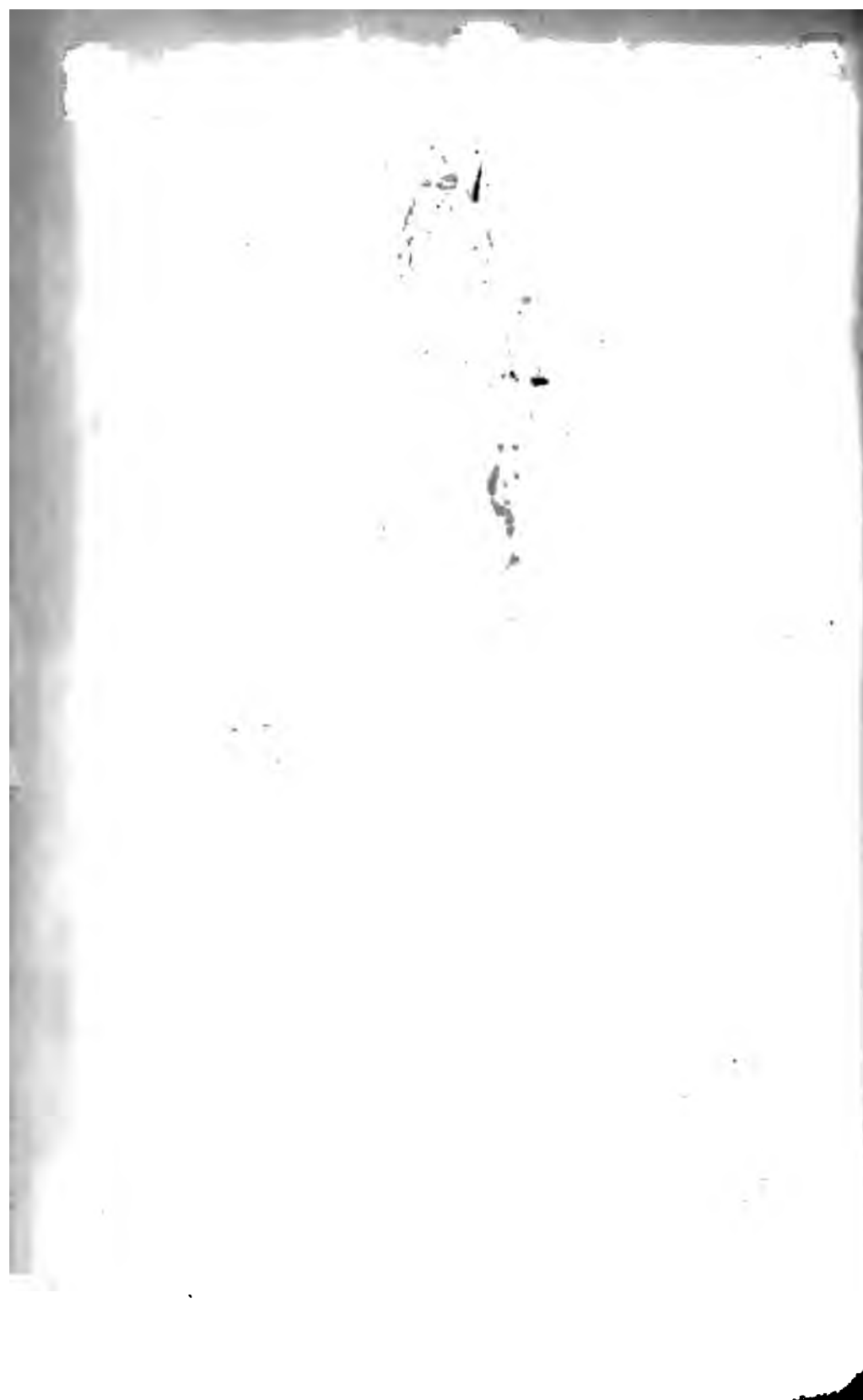
WITNESS.

1. In an action brought by the father for the seduction of his daughter, the daughter cannot be a witness to prove a previous promise of marriage, in aggravation of the damages; for she has her own right of action for the breach of that promise. *Foster v. Scofield*, 297
2. That a person is liable to be rated for the support of the poor of a town, does not render him an incompetent witness in a cause in which the town are interested as to the maintenance of a pauper. *Falls and Smith v. Belknap*, 486
3. The judge, before whom the proof of a deed is taken, is a competent witness to prove that it was done out of the state; but he is not bound to answer questions that may impeach his conduct as a public officer. *Jackson, ex dem. Wyckoff, v. Humphreys*, 498
4. A slave, after he has obtained his freedom, is a competent witness to prove a fact which happened while he was a slave. *Gurnie v. Dessies*, 508
5. A tenant, in an action of ejectment, may be a witness when called to prove a fact against his interest. *Young v. Vredenburg*, 159









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